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No. 90-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHESAPEAKE WESTERN RAILWAY, NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, and NORFOLK SOUTHERN CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED *

Does a carrier's disputed, but "arguable" claim of a contractual right to alter the actual, objective working conditions of its employees while bargaining for an agreement to cover those conditions, relieve the carrier of its obligation under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to preserve and maintain unchanged during the bargaining process those rates of pay, rules, or working conditions or established practices which were in effect prior to the time the bargaining dispute arose and which are related to that dispute?

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* Petitioners in this case are the Railway Labor Executives' Association and the following fourteen (14) labor organizations:

American Railway & Airway Supervisors Association (Division of TCU);
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway Carmen (Division of TCU);
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
Sheet Metal Workers' International Association;
Transportation • Communications International Union (TCU);
United Transportation Union; and
Yardmasters Department, UTU.

Several other labor organizations participated in earlier stages of this proceeding, but withdrew prior to the decisions by the district court which were the subject of the appeals to the Fourth Circuit. Also, one newly-formed rail carrier (*i.e.*, Carolina Coastal Railway, Inc.), was named as a defendant when this case was filed, but was dismissed when Petitioners amended their complaint prior to the district court's rulings at bar. Petitioners submit that those other organizations and that carrier no longer have an interest in this case. *See*, Rule 12.4 of the Rules of this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] [1] and fourteen (14) labor organizations [2] respectfully request that this Court issue a writ

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[1] RLEA is a voluntary, unincorporated association of the chief executive officers of seventeen (17) labor organizations which collectively represent most railroad employees in this Country. A list of RLEA's affiliated labor organizations is reproduced herein as Appendix I at 81a; those organizations that are petitioners herein are marked by asterisks.

[2] The fourteen petitioning labor organizations, all but two of which (*i.e.*, the United Transportation Union [hereinafter, "UTU"]

of certiorari to the United States Court of Appeals for Fourth Circuit to review the decision of that court in *RLEA v. Chesapeake Western Ry.*, 915 F.2d 116 (4th Cir. 1990).

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 915 F.2d 116 and is reproduced herein as Appendix A at 1a-11a. The initial ruling by the district court was given orally on February 16, 1990, is not reported, but is reproduced herein as Appendix C at 15a-27a. The district court subsequently issued a Memorandum Opinion, which is reported at 738 F. Supp. 1544 and is reproduced herein as Appendix E at 32a-59a.[3]

JURISDICTION

The decision of the Fourth Circuit was entered on September 17, 1990 and on December 10, 1990, Mr. Chief Justice Rehnquist, acting as a Circuit Justice, signed an order granting petitioners to and including January 15, 1991, in which to file this petition. *RLEA v. Chesapeake Western Ry.*, Sup. Ct. No. A-439. This petition is timely under 28 U.S.C. § 2101(c) and seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the proper interpretation of the Railway Labor Act's status quo obligation, which, as applicable here, is contained in Sections 5 First, 6 and

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and its Yardmasters' Department) are affiliated with RLEA, represent employees of respondents; those organizations are listed in footnote * on page (i) of this petition.

[3] On May 15, 1990, the district court entered an order denying petitioners' request for an injunction to enjoin one of the line sales at bar, and on May 18, 1990, United States Circuit Judge H.E. Widener, Jr., issued an order denying petitioners' request for such an injunction pending appeal. Neither order is reported, but both are reproduced herein as Appendices D and G, respectively, at 28a-31a and 61a-65a.

10 of the Act (45 U.S.C. §§ 155 First, 156, 160), when the carrier claims an arguable contractual right to make the change which the union asserts alters the status quo. Sections 2 First, 2 Seventh and 3 of the Act (45 U.S.C. §§ 152 First, 152 Seventh and 153) are also relevant to this case. All of the above statutory provisions are reproduced herein as Appendix H at 66a-80a.

STATEMENT OF THE CASE

This Court has long recognized that the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, provides different methods to resolve disputes over efforts to change existing agreements concerning rates of pay, rules or working conditions—*i.e.*, "major disputes"—and disputes over the interpretation of existing agreements—*i.e.*, "minor disputes." *Consolidated Rail Corp. v. RLEA*, 491 U.S. —— (1989), slip op. at 3-5. As relevant here, one essential difference between the two dispute resolution procedures is that in a major dispute "the parties are obligated to maintain the status quo, and the employer may not implement the contested change in rates of pay, rules, or working conditions" until the Act's bargaining procedures have been exhausted. *Id.*, slip op. at 3-4. In minor disputes, on the other hand, there is no "general statutory obligation on the part of an employer to maintain the status quo pending" the resolution of that interpretation dispute through the Act's adjustment and then compulsory arbitration process. *Id.*, slip op. at 5.

This petition arises out of rail labor's efforts to enforce the Act's status quo obligation, which the court of appeals agreed was triggered when the petitioning unions invoked the Act's major dispute procedures by serving notices on respondents under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to obtain agreements to deal with the impact of rail line sales and other transfers of operating rights on employees. App. A at 9a. Nevertheless, the lower courts concluded that the carriers did not have to maintain the status quo in this case because respond-

ents, in defense to rail labor's suit to enforce the Act's status quo obligation, had raised an arguable claim that they had a contractual right to alter the actual objective working conditions and practices. That arguable, albeit disputed, claim of a contractual right, the lower courts ruled, raised a minor dispute to which the Act's status quo obligation did not attach, and thus, the carriers' actions, according to the Fourth Circuit, did not violate the Act's status quo obligation. App. A at 10a. As we show below, the validity of the court of appeals' conclusion that a dispute over what actions can be taken during the status quo period raises a minor dispute, which in effect relieves the carriers of their status quo obligation, presents an important question concerning the proper administration of the Railway Labor Act. In effect, the court of appeals has eliminated the Act's status quo obligation in those cases where this Court has previously stated that "it is absolutely essential that the status quo provisions of the Act apply . . . if the purpose of the Act is to be fulfilled." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 155 (1969).

A. The Line Transfer Dispute

Our nation's railroads and rail labor have been embroiled in a dispute for the past decade over the manner in which employees should be treated when a railroad sells, leases, or otherwise transfers the rail line on which those employees are working to another operator for continued rail operations. Rail labor, relying upon its view of longstanding past practice dating back more than a half-century, and the equities which employees have earned by working on the rail lines, has maintained that a railroad transferring its rail operations should not do so unless the new operator agrees to allow the employees, who have the seniority to perform the work being transferred, to follow their work, with their collective bargaining agreements intact, to the new operator. Rail labor has also insisted that any employee adversely affected by the transfer should "be made whole." The

railroads, however, disagree with rail labor's view of what is appropriate. Instead, they have maintained that rail labor should look solely to the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, and to its administration by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"], for whatever benefits that Act may provide for employees affected by "transactions" within the ICC's regulatory jurisdiction, including line sales, leases or other transfers. Since the ICC has concluded that it will not impose the levels of protection which rail labor maintains are necessary,[4] rail labor has attempted to use the Railway Labor Act's major dispute procedures to negotiate agreements that would provide by contract the protections of employee interests that the railroads and the ICC had long provided before this recent era of deregulation. This case has grown out of petitioners' efforts to use the collective bargaining process to obtain by agreement what the ICC now refuses to provide by order.

Petitioners' initial efforts to utilize the Railway Labor Act's collective bargaining process were delayed by the "moratorium clauses" in the agreements reached with most railroads, including respondents,[5] during the 1984 round of

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[4] *See, Wilmington Terminal R.R.—Purchase and Lease*, 6 I.C.C.2d 799 (1990), *petition for review pending*, 6th Cir. No. 90-3621; *Ex Parte 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table).

[5] Respondents are the Norfolk Southern Corporation [hereinafter, "NS"] and three of its subsidiaries or affiliated companies, the Norfolk & Western Railway Company, Norfolk Southern Railway Company, and Chesapeake Western Railway [hereinafter, "N&W," "Southern" and "CW," respectively]. These railroads are operated as a single rail system, but maintain their separate corporate identities for certain purposes. Prior to December 31, 1990, respondent Southern's name was Southern Railway Company.

"national bargaining."[6] However, once the moratorium period expired on April 1, 1988, the unions began to serve Section 6 notices on most of our nation's railroads, including respondents, to negotiate agreements to deal with the manner in which employees will be affected by line sales, leases or other transfers. While there was some variation in the notices, essentially all of the bargaining requests sought agreements that would provide monetary benefits to any employee whose income was adversely affected by the transfer. Also, the majority of the notices asked the carriers to agree that they would not enter into an agreement to transfer a rail line unless the new operator committed both to employ the transferring carrier's employees who had seniority to perform the work being transferred and to assume the collective bargaining agreements applicable to those employees. J.A. at 67-76.[7] Petitioners

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[6] Most of our nation's railroads, including respondents N&W and Southern, bargain "nationally" with most of the labor organizations. What this means is that the carrier designates a committee comprised of the representatives of a few carriers to bargain on its behalf with one or more rail unions over a particular Section 6 notice. Once that agreement is reached, it typically includes what is known as a "moratorium clause" which provides that, for a certain period of time, neither the railroads nor the union will serve a notice on the other under Section 6 of the Act to change any agreement reached by that National Agreement. The National Agreements which resolved the 1984 Section 6 notices provided that no Section 6 notice would be served prior to April 1, 1988 for an agreement that could be effective prior to July 1, 1988, for a subject resolved by those negotiations.

[7] There is also another set of Section 6 notices which are involved in this case. In December 1989, respondents NS and N&W announced that they would sell and lease over 500 miles of rail lines, affecting over 400 employees, to a newly-formed railroad, which is now called the Wheeling & Lake Erie Railway Company [hereinafter, "W&LE"]. Most petitioners served Section 6 notices on the N&W on January 31, 1990, to negotiate an agreement to deal with the impact of that sale on employees. After meeting several times on those notices, the mediatory services of the National Mediation Board were invoked (J.A. at 322-24), and with the aid of the Board, all but two of the unions were able to resolve those disputes. Two disputes, however, remain pending before the Board.

served these notices because they recognize that the existing collective bargaining agreements do not require the railroads to provide the benefits which their notices seek to obtain by negotiation.

Respondents and the other railroads met with rail labor on those notices but maintained that the notices did not raise an issue over which they must bargain. J.A. at 89-90. Respondents explained their position by stating that, in their opinion, the ICC has been given exclusive jurisdiction over rail line transfers and that, consequently, they "are not required to bargain over Section 6 notices [such as the ones at bar] . . . to the extent those notices address matters within the ICC's exclusive jurisdiction, including, as a general matter, the 'effects' of an ICC-authorized transaction on employees." J.A. at 90. Respondents never asserted that the unions had waived their right to bargain because they were already parties to agreements dealing with line transfers. Indeed, no such contention could be made because the railroads nationally maintain that they have never entered into an agreement protecting employees from line transfers or their effects. Brief for NRLC at 5-6, as *amicus* on petition. Sup. Ct. No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. —— (1989).

Rail labor's efforts to resolve all of the issues raised by the Section 6 notices, including the line transfer dispute, were unsuccessful and beginning in late 1988 rail labor and the carriers began to invoke the mediatory services of the National Mediation Board [hereinafter, "NMB"] under Section 5 First of the Railway Labor Act, 45 U.S.C. § 155 First, to help resolve the disputes raised by the Section 6 notices. Mediation on those notices, including on the line sale dispute, also proved to be fruitless, in part because, as respondents informed the district court, their representative in that "bargaining" was "not bargaining with the unions with respect to the provisions in the section 6 notices that address dispositions of rail

lines . . . ." J.A. at 155. Indeed, meaningful negotiations on this issue never occurred (J.A. at 274-75), and on April 5, 1990, the NMB released most, but not all of the petitioners from its mediatory jurisdiction. J.A. at 318.[8]

Before the Act's status quo period expired, however, the President created an Emergency Board on May 3, 1990, under Section 10 of the Act, 45 U.S.C. § 160, to investigate the disputes raised by the Section 6 notices, including the line transfer dispute. Executive Order No. 12,714, 55 Fed. Reg. 19047 (May 8, 1990). That Board has heard evidence on the disputes, including the line transfer dispute, and is currently scheduled to issue its report to the President on January 15, 1991.[9]

B. The Status Quo Dispute

In February 1988, respondents adopted a plan to shed 1,200 miles of rail lines, which were only marginally profitable, from their 17,000 mile rail system. J.A. at 238. This plan, called the "Thoroughbred Shortline" program, contemplated leasing these marginal lines to small railroads or newly-formed carriers. Those leases were to be for long terms, usually twenty (20) years, with the rent calculated to generate a payment of the net liquidation value of the line over the term of the lease, with a profit equal to the return on investment which NS seeks to obtain from all of its lines—approximately 11% annually. J.A. at 238. Additionally, in order to continue to receive traffic from these lines, NS offers the lessee a

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[8] One petitioner, the International Association of Machinists and Aerospace Workers [hereinafter, "IAM"] was not released and is still in mediation. *See*, J.A. at 327-28.

[9] Although the status quo for most petitioners will expire thirty (30) days after that report is issued, unless Congress modifies Section 10 of the Act as it applies to these disputes, this case will not be moot because the IAM is still in mediation, two organizations are still in mediation on their Section 6 notices served in connection with the W&LE sale (*see*, note 7, *supra*) and rail labor has sought make-whole relief for the past violations. J.A. at 38-39.

credit for each car received from the line so that the line will be rent-free if the lessee produces traffic equal to that which was obtained from the line while it was part of the NS system. J.A. at 238-39. No Thoroughbred transfer occurred prior to April 1988 when the first line transfer Section 6 notice was served on respondents.

When respondents began to implement the Thoroughbred Shortline program after the unions had served their Section 6 notices on line transfers, and also engaged in two intracorporate transfers of operating rights,[10] without first resolving the line transfer dispute, petitioners filed a complaint with the United States District Court for the Eastern District of Virginia to challenge those transfers, invoking the district court's jurisdiction under 28 U.S.C. § 1337(a). Petitioners,[11] asserting in part that those line transfers violated respondents' status quo obligation under the Railway Labor Act, sought both declaratory and injunctive relief. As relevant here, petitioners asked the Court to declare that respondents violated the Act's status quo command by transferring its lines and operating rights during the bargaining period.[12] Petitioners

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[10] One intracorporate transaction occurred in April 1989, when respondent Southern transferred a portion of its rail lines to CW, a wholly-owned subsidiary of N&W. Unlike Southern's employees, most of respondent CW's employees are not covered by collective bargaining agreements. J.A. at 31-32. The second intracorporate transaction involved the grant of trackage rights by Southern to the N&W so that the N&W could perform a service which Southern had asked its operating employees to perform, but could not perform unless the unions agreed to modify their contracts. When one of the operating unions declined to modify the collective bargaining agreement, NS assigned the work to N&W which had obtained the necessary contract modifications. J.A. at 33.

[11] The complaint, which was filed in August 1989, was amended in December of that year to simplify the issues and to delete several labor organizations which are members of RLEA, but do not represent NS employees.

[12] Petitioners, also challenged respondents intracorporate transactions as being actions that, collectively, violated Sections 2 Third,

also asked the court to order respondents both to restore the status quo to the maximum extent practical and to make whole the employees who were improperly affected. J.A. at 37-39.

Respondents defended against that suit by filing a counterclaim which, in part, sought a declaration that the dispute over whether respondents could transfer rail lines during the bargaining process raised a minor dispute subject to the exclusive jurisdiction of the Railway Labor Act's adjustment boards. J.A. at 59. To support that assertion, respondents NS, N&W and Southern claimed that they were parties to collective bargaining agreements with the petitioning unions which "recognized" their right to engage in sales, leases, and other dispositions of rail lines. J.A. at 56-57. Respondents next stated that since the unions' status quo claim disputed that right, the dispute raised by the complaint must be one over the interpretation of their contractual rights. J.A. at 57-58.

Relying upon that view of their contractual rights, respondents moved for summary judgment and supported their assertion as to their "right" to transfer rail lines by referring the court to provisions in the collective bargaining agreements dealing with the manner in which they may reduce forces. Respondents also asserted that their claim of a contractual right to transfer lines was supported by a past practice, which the unions disputed, of abandoning and engaging in other sales and leases without first bargaining under the Railway Labor Act. *See*, App. E at 43a-46a.

C. Rulings By The Lower Courts

On February 16, 1990, the district court entered an order granting respondents' motion for summary judgment on part of the litigation, concluding that the court lacked subject matter jurisdiction over rail labor's com-

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Seventh, and Ninth of the Railway Labor Act, 45 U.S.C. §§ 152 Third, Seventh, and Ninth. J.A. at 34-35.

plaint.[13] App. B at 13a. As the court explained in both its oral ruling of February 16, 1990 (App. C at 15a) and its written opinion (App. E at 32a) which was entered on June 13, 1990, the dispute over what actions respondents could take during the bargaining process was a "minor dispute because it is arguably capable of being conclusively resolved by interpreting the existing agreements, either expressed or implied." App. C at 17a-18a; *see also*, App. E at 40a-49a. According to the district court (42a-44a; footnote omitted):

> In none of these agreements [*i.e.*, the written collective bargaining agreements] is there any restriction on the right of the carrier to sell, lease, abandon, or grant trackage rights over its rail lines. Nor do the agreements obligate NS, NW, or Southern to require that a purchaser or lessee of a rail line assume the parties' existing collective bargaining agreements, or hire the carriers' employees. Rather, recognizing that a carrier's discontinuance of operations may cause jobs and work assignments to be eliminated or reduced and employees to be reassigned to different positions, the agreements include provisions, in various forms, explicitly reserving to NS, NW and Southern the flexibility to abolish jobs and furlough employees as a result of a sale, lease, abandonment, or other disposition of a rail line. Thus, NS, NW, and Southern may unilaterally abolish positions and furlough employees subject only to the limited constraints prescribed in the agreements.

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[13] Respondents' counterclaim also sought injunctive relief to prevent rail labor from striking. J.A. 62-63. The district court did not rule on that request in February, but rather, asked the parties to file additional briefs on that issue. App. C at 26a. Rail labor responded that the unions had no intentions of striking over the line transfers in light of the court's ruling, and on May 15, 1990, the court issued an order denying the request for injunctive relief because no strike was imminent, but noted that respondents could seek such injunctive relief, "[s]hould circumstances change . . . ." App. D at 31a.

The court then added that its conclusion that this case presented a minor dispute meant that it lacked jurisdiction over rail labor's complaint to enforce the Railway Labor Act. App. B at 13a.[14]

Rail labor's efforts to use the Railway Labor Act's bargaining procedures to change those agreements to limit the carriers' flexibility by adding specific provisions dealing with line transfers, including an obligation requiring respondents to refrain from transferring a rail line unless the new operator has agreed to hire the affected employees and assume their collective bargaining agreements, did not, in the district court's opinion, freeze that flexibility. This was so, the district court said, because the service of a Section 6 notice does not transform a minor dispute into a major dispute. App. E at 49a.

Petitioners noted appeals from the district court's rulings to the Fourth Circuit, invoking the court of appeals' jurisdiction under 28 U.S.C. § 1291.[15] On September 17, 1990, the Fourth Circuit issue its decision dismissing the appeals, in part, as moot,[16] and affirming the lower court's

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[14] As an alternative basis for its ruling that it lacked jurisdiction over rail labor's complaint, the district court held that the ICC "has exclusive jurisdiction over those transactions authorized and conducted pursuant to 49 U.S.C. § 11343" (App. B at 13a), which included most, but not all, of the line transfers at issue. *See*, App. E at 53a-57a. The court of appeals did not reach that issue. App. A at 10a n.7.

[15] Petitioners treated the district court's order of May 15, 1990 (*see*, App. D at 28a) as finally resolving this case and on May 17, 1990, noted an appeal pursuant to 28 U.S.C. § 1291, or alternatively, pursuant to 28 U.S.C. § 1292(a)(1). J.A. at 382. The issue as to the finality of the district court's order was mooted when the district court issued a judgment on July 3, 1990 (App. F at 60a) and petitioners filed another notice of appeal pursuant to 28 U.S.C. § 1291. That second appeal was consolidated with the first. App. A at 6a n.2.

[16] The court of appeals concluded that the unions' challenge to the denial of their requests for injunctive relief to prevent the

judgment in all other respects. Rail labor, the appellate court ruled, was correct in asserting that the unions' Section 6 notices raised a major dispute, and that, "[a]ccordingly, the railroad must maintain the status quo during those negotiations . . . ." App. A at 9a. However, the court then added that rail labor's efforts to enforce that status quo were illfounded because (App. A at 9a-10a; emphasis in original):

> The Achilles' heel of the Unions' argument [that respondents violated the Act's status quo obligation] is that the railroad's actions are "arguably justified" by the *existing* agreement. The service of a § 6 notice and the beginning of bargaining over the proposed changes does not convert a minor dispute into a major one. . . . Therefore, the railroad's sales do not alter the status quo in violation of the RLA.

This petition has followed.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the proper relationship between the Railway Labor Act's major and minor dispute resolution procedures which has not been addressed directly by this Court, but needs to be because of the confusion which now exists among the circuits. That confusion, and indeed the need for this Court to review this issue, is evident here, for the Fourth Circuit has decided this important question—i.e., whether a carrier's arguable, but disputed, claim of a contractual right to alter the status quo while bargaining over a major dispute relieves that carrier of the Act's status quo obligation—in a way that conflicts with the decisions of this Court in *Consolidated Rail Corp. v. RLEA* [hereinafter, *"Conrail"*], 491 U.S. —— (1989) and *Detroit & Toledo Shore Line R.R. v. UTU* [hereinafter, *"Shore Line"*], 396 U.S. 142 (1969), and in a way

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W&LE and other sales that were consummated before review could be had, was moot. App. A at 6a.

that aggravates the conflict that currently exists among the circuits as to the proper relationship between the two dispute resolution schemes.

I. WHETHER OR NOT THE STATUS QUO OBLIGATION APPLIES IN A MAJOR DISPUTE, WHERE ONE OF THE DISPUTANTS CLAIMS A CONTRACTUAL RIGHT TO ALTER THE STATUS QUO, PRESENTS AN ISSUE WHICH IS IMPORTANT TO THE ORDERLY ADMINISTRATION OF THE RAILWAY LABOR ACT

Efficient and uninterrupted rail and air transportation are obviously important to the economy of this country, and the proper interpretation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, is important to achieving those goals.[17] That Act, which until recently has been so successful in enabling this nation to achieve efficient and uninterrupted transportation, has accomplished this by providing mechanisms to resolve labor disputes before those disputes reached the point that self-help was the only way left to settle the controversy. As relevant here, that Act achieved these goals by providing different procedures to resolve disputes over rates of pay, rules, or working conditions, depending upon whether the dispute is one over *changes* to existing agreements—*i.e.*, "major disputes"—or one over the proper *interpretation* of existing agreements—*i.e.*, "minor disputes". *Conrail*, slip op. at 3-8.

When labor and management proposed what became the Railway Labor Act in 1926, they recognized that the "only kind of a dispute wherein there is any danger of an interruption of commerce by a change of the conditions by, for example, a strike is a dispute where there is a change sought in the existing rules and working conditions." *Hearings on H.R. 7180, before House Commit-*

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[17] The Railway Labor Act applies to rail and air carriers. 45 U.S.C. §§ 151 First, 181.

tee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. at 93 (1926) (Statement of D.R. Richberg). Congress obviously agreed with this observation, and it adopted the proposed legislation which sought to prevent such a dispute from reaching the state that commerce was threatened, by providing a detailed procedure designed to enable the parties to resolve that dispute by meaningful collective bargaining; that process calls upon the government to aid the parties in resolving their dispute by mediation, but not compulsion, and, indeed as occurred here, may involve even the President of the United States in the process. 45 U.S.C. § 160. This Act not only requires the parties "to exert every reasonable effort" to resolve their disputes, but it also imposes as an integral part of that bargaining process the obligation—*i.e.*, the status quo requirement—that no party will change "the conditions out of which the dispute arose" [18] until the bargaining process is exhausted.

As this Court observed in *Shore Line*, the "Act's status quo requirement is central to its design." 396 U.S. at 150. Indeed, it was the agreement of both labor and management in 1926 that both sides would "wait [before making a change] and give the Government full opportunity to adjust the controversy," [19] that is both the essence of the "compromise" enacted in 1926 and the strength of the Act's major dispute resolution process. That compromise—the status quo obligation—makes the economic strength of the parties virtually irrelevant by substituting as the primary bargaining leverage the ability of the party opposing the change to delay the other's implementation of the change in existing working conditions pending an agreement. 396 U.S. at 150.

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[18] 45 U.S.C. § 160.

[19] *Hearings on S.2306, Before Senate Committee On Interstate Commerce*, 69th Cong., 1st Sess. at 89 (1926) (Statement of D.R. Richberg).

Consequently, the proper interpretation and application of the Act's status quo obligation is crucial to the effective administration of this important labor statute.

This Court addressed the scope of the status quo before in *Shore Line* and concluded that the "obligation of both parties during a period in which [the Act's status quo command] . . . is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, *broadly conceived*, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." 396 U.S. at 152-53 (footnote omitted; emphasis added). That obligation, as this Court noted in *Shore Line* and recently reiterated in *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. —— (1989), slip op. at 13-14 n.15, requires a carrier to do more during the status quo period than merely continue to honor its express and implied agreements. Rather, that obligation looks past the agreements to the actual, objective working conditions and practices and requires the carrier to preserve and maintain unchanged those relevant, objective working conditions "regardless of the fact that the railroad was not precluded from making [such changes] . . . under the existing agreements" (396 U.S. at 154), either express or implied. While this Court observed in *Pittsburgh & Lake Erie* that *Shore Line* extended the status quo language "to its outer limits" (slip op. at 13), this Court did not overrule *Shore Line*.[20]

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[20] Petitioners have recently filed a petition for a writ of certiorari which presents important questions concerning the scope of the Act's bargaining and status quo obligations in line transfer cases. Sup. Ct. No. 90-991, *RLEA v. Chicago & North Western Transportation Co.* That case also raises a question as to the relationship between the major and minor dispute resolution process which is comparable, but not identical, to that presented by this petition. Petitioners submit that if this Court were to issue the writ in No. 90-991, and also issue the writ here, the two cases should be consolidated for briefing and argument.

In this case, however, the court of appeals has effectively *eliminated* the status quo obligation in the type of case involved in *Shore Line* by equating a dispute over what actions could be taken during the status quo period with a "minor" dispute. Here, the Fourth Circuit concluded that the "dispute [raised by the unions' Section 6 notices] over prospective contract rights is major" and that the carriers "must maintain the status quo during those negotiations . . . ." App. A at 9a. That requirement, nevertheless, was then rendered meaningless when the court concluded that since respondents had raised an *arguable* right to alter the status quo, they had the right to make that change because the status quo obligation did not apply to that change—*i.e.*, the service of a Section 6 notice "does not convert a minor dispute into a major one.' *Id.* In other words, the Fourth Circuit has modified the status quo obligation as it applies in that circuit to now provide that whenever the status quo obligation is properly invoked the parties must maintain unchanged the actual, objective conditions unless the carrier raises simply an arguable contractual right to make the change. App. A at 7a-8a. Unfortunately, that modification of this broad and crucial obligation applies to those situations where the status quo obligation is most meaningful and necessary.

As this Court observed in *Conrail*, slip op. at 10 n.7, "the general framework of a collective-bargaining agreement leaves some play in the joints, permitting management some range of flexibility in responding to changed conditions." Here, respondents relied upon that "flexibility" to argue that they had a contractual right to make the contested changes (App. E at 42a-43a) and rail labor served the Section 6 notices to limit that flexibility by asking to have included within the agreements specific provisions to deal with line transfers and their impact on employees. A comparable situation was presented by *Shore Line*, for in that case the union sought to limit the carrier's flexibility to make certain changes

by including under the express coverage of the agreement a subject matter that, as here, had previously been left to the carrier's discretion. 396 U.S. at 154-55. Nevertheless, according to the Fourth Circuit there is no status quo requirement when, as occurred in *Shore Line*, a union seeks to place under the agreement a working condition over which the carrier enjoys flexibility. But, as this Court observed in *Shore Line* (396 U.S. at 155):

> When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled.

Petitioners respectfully submit that the question of whether the Fourth Circuit was correct in eliminating the status quo requirement in cases where this Court has previously stated its proper application is "absolutely essential," raises an important issue and, as we show below, needs to be resolved by this Court.

II. THIS COURT SHOULD RESOLVE THIS QUESTION BECAUSE THE FOURTH CIRCUIT HAS DECIDED THIS IMPORTANT ISSUE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS BY THIS COURT

Although this Court has not directly addressed the question presented by this petition, it has previously considered in both *Conrail* and *Shore Line* the relationship between the Railway Labor Act's major and minor dispute resolution procedures and the scope of the Act's status quo obligation. Those decisions, petitioners submit, provide the framework by which this question should be resolved. But, as the Fourth Circuit's failure to grasp the proper relationship between the two dispute resolution procedures shows, the lower courts need further guidance from this Court on this important issue in order to insure that the Act's procedures are applied properly.

This Court addressed one aspect of this question in *Conrail* and concluded that in a case where the carrier asserts an arguable claim that the "parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, . . . the employer may make the change and the courts must defer to the arbitral jurisdiction of the [Adjustment] Board." Slip op. at 11. It is that principle on which the court of appeals relied to hold that since respondents had presented an arguable claim of a contractual right to change working conditions, they could do so during the Act's major dispute process without violating the Act's status quo obligation. App. A at 9a-10a. However, in relying upon *Conrail*, the Fourth Circuit gave no consideration whatsoever to the fact that neither party in *Conrail* had invoked the Act's bargaining or status quo obligation through the service of a Section 6 notice, and, indeed, the question presented for resolution in that case was whether the carrier's proposed changes had *triggered* the Act's bargaining and status quo obligations. *See*, slip op. at 5-6 n.5. In this case, the court of appeals acknowledged that the unions had served valid Section 6 notices and had invoked the Act's status quo requirement. App. A at 9a.

Conrail, we submit, must be read in light of *Shore Line*, a case where this Court addressed the scope of the status quo, for in that case it was conceded that the Act's bargaining and status quo obligations had been properly invoked. 396 U.S. at 153, 158. In that case, this Court held that the status quo obligation was broad and was to be applied by looking to the actual, objective manner in which the parties had acted, and not, as the dissent argued, by looking to their contractual understandings. 396 U.S. at 160 (Harlan, J., dissenting). That principle, if applied here, as petitioners submit it should have been, would invalidate the Fourth Circuit's ruling.

However, *Shore Line* is not quite on "all fours," for in that case the union's assertion that the contracts pro-

hibited the carriers from making the disputed change had been submitted to an adjustment board and that board had ruled that there was "nothing in the rules of agreement which precludes this carrier from establishing an outside assignment"—*i.e.*, the disputed change. 396 U.S. at 146 n.9, *quoting* adjustment board award. This case is comparable, for rail labor has never argued that the existing agreements preclude the line transfers; rather, petitioners assert that the agreements are silent on this point, an assertion similar to the factual situation presented in *Shore Line*. Consequently, the issue which must be addressed in this case, but which was not addressed by the Fourth Circuit, is whether the fact that respondents claim an arguable contractual right to make the disputed change, makes *Shore Line* inapplicable and *Conrail* controlling—*i.e.*, does that claim relieve respondents of the status quo obligation that was triggered by the unions' Section 6 notices.

Since this issue is so important to the orderly administration of the Railway Labor Act for both the rail and airline industries, this Court, petitioners submit, should accept this opportunity to resolve this pressing issue.

III. THIS COURT SHOULD RESOLVE THIS QUESTION BECAUSE THE FOURTH CIRCUIT HAS DECIDED THIS ISSUE IN A WAY THAT CONFLICTS WITH DECISIONS BY OTHER CIRCUITS AND ADDS FURTHER CONFUSION TO AN UNSETTLED AREA OF THE LAW

This issue, namely the relationship of a claimed contractual right to the Railway Labor Act's status quo requirement, is not something that has sprung up overnight. Rather, it has been a subject of contention for decades, but unfortunately, it is now further from being resolved by the circuits than ever before.

In *Rutland Ry. v. BLE*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), a divided panel of the

Second Circuit concluded that, in a situation where a carrier relied upon an arguable, but disputed, contractual right to take the challenged action while a dispute raised by the union's Section 6 notice was pending, the carrier could implement the change because the case presented a minor dispute. Justice Marshall, then a member of that court, dissented and stated as follows concerning his views as to the proper interpretation of the Act's status quo obligation where the carrier claims an arguable contractual right to alter the status quo (307 F.2d at 44-45 n.11):

> [T]he preferable view is that changes in existing conditions which are the subject of a major dispute are forbidden whether or not they are arguably authorized by the collective agreement. The "freeze" provisions carefully avoid reference to the collective agreement, but emphasize "working conditions" (Section 6), "established practices" (Section 5), and "conditions out of which the dispute arose" (Section 10). This is in contrast to other parts of the Act, and, indeed, Section 6 itself, which refer directly to the "agreement" when necessary. Moreover, the legislative history of the statute shows the "freeze" provisions were intended to enforce a "cooling off" period upon both labor and management in the railroad industry. . . . But this policy cannot be effectuated if management is allowed to take advantage of an ambiguous contract during the "freeze" to make changes in working conditions relating to the dispute. Such an action is far more likely to warm up the dispute than cool it off.

Justice Marshall's view of the Act, which petitioners submit became the view of this Court in *Shore Line*, does not stand alone among the circuits, for the District of Columbia Circuit adopted a similar approach to the Act in *Southern Ry. v. Brotherhood of Locomotive Firemen*, 337 F.2d 127 (D.C. Cir. 1964). In that case, the courts accommodated the two dispute resolution procedures by enjoining the carrier from altering the status quo until

either it completed the bargaining process or received an adjustment board award upholding its contract interpretation. As the court stated (337 F.2d at 132):

> [T]he injunction [preserving the status quo] . . . must forbid also a change in the long-standing interpretation in this respect which had been given by the parties to the existing contract. To allow a change in the construction of the contract in the way sought here would in substance and effect change the contract itself, as acted upon and applied by the parties from the beginning. As the District court said, to permit this would subvert the purpose and intent of Section 6 of the Act.

Subsequent appellate court decisions have recognized that a dispute over what actions a carrier may take during the Act's status quo period should not be viewed as "converting" what is actually a major dispute into a minor one. *E.g.*, *RLEA v. Chicago & North Western Transportation Co.*, 890 F.2d 1024, 1026 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 3237 (1990); *United Industrial Workers v. Board of Trustees*, 351 F.2d 183, 189 (5th Cir. 1965). But, recently, the circuits have lost sight of the reason why a carrier may alter the status quo in a minor dispute—*i.e.*, because the Act's status quo obligation is not triggered—and have begun to rely upon certain catchy phrases [21] to conclude that in a case where the union has served a valid Section 6 notice, a carrier's reliance upon a disputed contractual right to alter the status quo during that bargaining makes the controversy over the changes during the status quo period a minor dispute to which the Act's status quo does not apply.

However, as petitioners explained in their petition for a writ of certiorari on a comparable question in Sup. Ct.

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[21] For example, in *CSX Transportation, Inc. v. UTU*, 879 F.2d 990, 1000 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 720 (1990), the Second Circuit stated that the service of a Section 6 notice "would have no transforming or alchemizing effect upon" the characterization of a dispute as being minor.

No. 90-991, *RLEA v. Chicago & North Western Transportation Co.*, filed December 19, 1990 (see note 20, *supra*), the circuits are hopelessly at odds over the impact which a claimed contractual right to alter the status quo during the bargaining process has on the bargaining process itself. In the Second [22] and Third [23] Circuits, the contractual right claim trumps the bargaining and status quo obligations totally. In the Fourth Circuit, as this case shows, that claim eliminates the status quo obligation, but not the bargaining requirement. In the Seventh Circuit, [24] that claim eliminates the union's right to exercise self-help, even after the bargaining process is completed. And in the Eighth Circuit, [25] claims identical to those raised in each of the above cases do not raise a minor dispute or in any other way affect the major dispute process.

Petitioners respectfully submit that there is no consistent rationale which can explain these conflicting decisions. Indeed, the validity of this assertion that the circuits are hopelessly confused may be seen graphically from a review of the various explanations given by the judges on the United States Court of Appeals for the District of Columbia Circuit explaining their votes on a petition for *en banc* consideration in *ALPA v. Eastern Air Lines, Inc.*, 863 F.2d 891 (D.C. Cir. 1988), *en banc denied* (1989), *cert. pending*, Sup. Ct. No. 88-1403.

This Court, petitioners respectfully submit, should accept review of this case and resolve this important issue.

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[22] *CSX Transportation, Inc. v. UTU*, *supra* note 21.

[23] *General Committee of Adjustment v. CSX R.R.*, 893 F.2d 584 (3rd Cir. 1990).

[24] *Chicago & North Western Transportation Co. v. RLEA*, 908 F.2d 144 (7th Cir. 1990), *pet. for cert. pending*, Sup. Ct. No. 90-991; *see*, note 20, *supra*.

[25] *RLEA v. Chicago & North Western Transportation Co.*, *supra*.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

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Date: January 15, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90-2677

RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSOCIATION; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY CARMEN; INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS AND BLACKSMITHS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; RAILROAD YARDMASTERS OF AMERICA; UNITED TRANSPORTATION UNION,

Plaintiffs-Appellants,

and[*]

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEER'S ASSOCIATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; TRANSPORT WORKERS UNION OF AMERICA,

Plaintiffs,

versus

[* On December 20, 1990, the Fourth Circuit issued an order amending the captions to read as reproduced herein. Prior to that amendment, the captions aligned the first group of unions against all of the other named organizations and carriers.]

CHESAPEAKE WESTERN RAILWAY; SOUTHERN RAILWAY COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK SOUTHERN CORPORATION,

Defendants-Appellees,

and

CAROLINA COASTAL RAILWAY, INCORPORATED,

Defendant.

No. 90-2697

RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSOCIATION; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY CARMEN; INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS AND BLACKSMITHS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; RAILROAD YARDMASTERS OF AMERICA; UNITED TRANSPORTATION UNION,

Plaintiffs-Appellants,

and[*]

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEER'S ASSOCIATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; TRANSPORT WORKERS UNION OF AMERICA,

Plaintiffs,

versus

[See note * on page 1a.]

CHESAPEAKE WESTERN RAILWAY; SOUTHERN RAILWAY COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK SOUTHERN CORPORATION,

Defendants-Appellees,

and

CAROLINA COASTAL RAILWAY, INCORPORATED,

Defendant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria
T.S. Ellis, III, District Judge. (CA-89-1157-A)

Argued: July 16, 1990 Decided: September 17, 1990

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Affirmed in part and dismissed in part by published opinion. Judge Hall wrote the opinion, in which Judge Russell and Judge Widener joined.

ARGUED: John O'Brien Clarke, Jr., HIGHSAW, MAHONEY & CLARKE, P.C., Washington, D.C., for Appellants. Jeffrey Stephen Berlin, RICHARDSON, BERLIN & MORVILLO, Washington, D.C., for Appellees. ON BRIEF: David J. Strom, HIGHSAW, MAHONEY & CLARKE, P.C., Washington, D.C., for Appellants. Mark E. Martin, RICHARDSON, BERLIN & MORVILLO, Washington, D.C.; William P. Stallsmith, Jr., Norfolk, Virginia, for Appellees.

HALL, Circuit Judge:

The Railway Labor Executives' Association and several other railroad labor unions ("Unions") appeal an order of the district court granting summary judgment dis-

missing the Unions' action against Norfolk Southern Railway Co. and some of its subsidiaries ("NS") seeking declaratory and injunctive relief under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.* We dismiss the appeal in part as moot, and affirm in all other respects.

I.

This case arises from the displacement of railroad workers by the sale and lease of certain railroad lines by NS.

In October 1987, NS identified 2,700 miles of its system that were unprofitable. 1,500 miles had no potential for profitability and were slated for abandonment: the remaining 1,200 marginally-profitable lines were to be sold or leased to "short line" operators—small railroads that could operate the lines more economically than NS. As of late May 1990, approximately 810 miles had been transferred under this program. In each instance, the transferee short-line railroad operates the line with its own employees.

All of the transfers are subject to the jurisdiction of the Interstate Commerce Commission ("ICC"). Where the transfer is to an operating ICC-regulated "carrier," the ICC authorization is issued under 49 U.S.C. § 11343. In these transactions, the ICC must impose certain "employee protective conditions." 49 U.S.C. § 11347.[1] On the other hand, transfers to entities that have not before been "carriers" under the ICC are governed by 49 U.S.C. § 10901; no employee protective measures are generally imposed. A key transaction at issue in this case is of this latter type—550 miles of lines sold by NS to Wheeling & Lake Erie Railway Co. (W&LE), a newly-formed corporation.

The Unions filed this action on August 4, 1989, and amended their complaint December 12, 1989. The complaint challenged NS' authority to transfer lines without

[1] These conditions include up to six years of wage protection.

bargaining under the RLA. The Unions sought declaratory relief that bargaining was required and injunctive relief prohibiting further transfers until bargaining was complete. On December 19, NS answered the complaint and counterclaimed for a declaratory judgment that the dispute is "minor" under the RLA and for an injunction prohibiting the Unions from striking over the dispute.

The parties filed cross-motions to dismiss and/or for summary judgment. On February 16, 1990, after hearing argument, the district court entered an order granting NS summary judgment on its declaratory judgment claim and dismissing the Unions' complaint, and noted that an opinion would be forthcoming.

The February 16 order did not dispose of NS' request for a strike injunction, and on March 12, the Unions filed a competing motion to enjoin the then-pending sale of 550 miles of track to W&LE. This motion sought to preserve the status quo until the completion of arbitration of the Unions' claims (the mandatory remedy for "minor" disputes under the RLA). On May 15, the district court denied the Unions' motion. It further denied NS a strike injunction because a strike was not then threatened, but without prejudice to a renewal of the motion should circumstances change. On May 17, the Unions filed their notice of appeal, and the district court denied their motion to enjoin consummation of the W&LE transaction pending appeal. Undaunted, the Unions made an "emergency motion" for injunction pending appeal to this court on May 18. The emergency motion was denied, but consideration of this appeal was expedited. The W&LE transaction had actually already been completed on May 17.

II.

NS has moved to dismiss the appeal. In part, NS argues that the Unions' claim for injunctive relief against the W&LE transaction was mooted by its occurrence.[2]

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[2] NS also initially argued that because its request for a strike injunction could still be renewed in the district court, and because

The Unions' complaint is a broad attack on NS' entire policy of transferring lines without bargaining, and requests injunctive relief against any such transfers. In its motion to dismiss the appeal, however, NS argues that, as regards any transaction (such as the sale to W&LE) that has been completed, the Unions' request for injunctive relief is moot. We agree. An appeal of the denial of an injunction to prohibit an act is rendered moot by the happening of the act. *Seafarers Int'l Union v. National Marine Services, Inc.*, 820 F.2d 148 (5th Cir.), *cert. denied*, 484 U.S. 953 (1987); *IBTCWHA v. Western Airlines, Inc.*, 854 F.2d 1178 (9th Cir. 1988). Therefore, to the extent the Unions seek to enjoin the occurrence of past events, their appeal is dismissed as moot.

III.

The heart of this case is whether the district court had jurisdiction over the dispute between the parties. Under the RLA, disputes that arise between a railroad and its employees are divided into two categories. Disputes arising from grievances or under the collective bargaining agreement are subject to compulsory arbitration. RLA § 3, 45 U.S.C. § 153. The courts have rather inappropriately labeled these disputes "minor." During arbitration of a "minor" dispute, the employer may make changes in working conditions in accordance with his interpretation of the collective bargaining agreement.

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the district court's memorandum opinion explaining its February 16 order had not yet issued, the Unions' appeal was interlocutory. Two events below resolved this argument.

On June 13, 1990, the district court issued an opinion explaining its February 16 and May 15 orders. The Unions informed the district court of the dispute on appeal concerning the finality of the judgment, and on July 3, the district court entered a final judgment for NS. The Unions noted appeal No. 90-2697 immediately, and NS consented to the Unions' motion to consolidate. This court granted the motion. Thus ended any dispute over the finality of the judgment below.

A "major" dispute, governed by RLA § 6, 45 U.S.C. § 156, involves the creation or change of a collective bargaining agreement. These disputes are resolved through a lengthy process of negotiation, compulsory mediation, voluntary arbitration, and, if all else fails, strikes and lockouts. During this process, the employer may not impose a unilateral change in the working condition being negotiated.

Distinguishing a major from a minor dispute can be difficult, but the test is deliberately tilted toward finding a dispute minor:

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employers' claims are frivolous or obviously insubstantial, the dispute is major.

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S.Ct. 2477, 2482 (1989).

NS asserts just such a contractual right to transfer lines. NS argues that the furlough and reduction in force provisions of its collective bargaining agreement inescapably imply that it has unimpeded power to sell lines and lay off workers. In addition, NS presented evidence of a past practice of acquiescence by the unions in this interpretation.

We agree with the district court's conclusion that NS' position is "arguably justified" by the agreement. A railroad has a "light burden" to establish arbitrability under the RLA. *Consolidated Rail*, 109 S.Ct. at 2482. A district court need not, indeed should not, assess the relative merits of the parties' competing interpretations of the contract in order to find the dispute "minor." If the railroad's assertion that the collective bargaining agreement controls the dispute rises above the "frivolous or obviously insubstantial," then the court must dismiss the action for lack of subject matter jurisdiction. *Kushto*

v. Brotherhood of Railway, Airline and Steamship Clerks, 818 F.2d 290, 293 (4th Cir. 1987) (district court may not address merits of minor dispute, but must instead dismiss for lack of jurisdiction).[3] In this case, the district court found:

> In none of [the collective bargaining agreements] is there any restriction on the right of the carrier to sell, lease, abandon, or grant trackage rights over its rail lines. Nor do the agreements obligate [NS] to require that a purchaser or lessee of a rail line assume the parties' existing collective bargaining agreements, or hire the carriers' employees. Rather, recognizing that a carrier's discontinuance of operations may cause jobs and work assignments to be eliminated or reduced and employees to be reassigned to different positions, the agreements include provisions, in various forms, explicitly reserving to [NS] the flexibility to abolish jobs, and furlough employees as a result of a sale, lease, abandonment, or other disposition of a rail line.

Railway Labor Executives' Ass'n v. Chesapeake Western Ry., No. CA-89-1157-A, slip op. at 13 (E.D. Va., June 13, 1990).

This reasoning certainly presents an "arguably justified interpretation of the existing agreements; accordingly, the dispute is minor.[4]

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[3] The district court does have the limited jurisdiction to enjoin strikes over minor disputes. *Consolidated Rail*, 109 S.Ct. at 2481, *citing Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30 (1957).

[4] Inasmuch as NS' position is "arguably justified" by the existing agreement, we need not address the more difficult question whether a railroad's status quo obligation during resolution of a major dispute prohibits it from divesting itself of lines. The Supreme Court has answered this question no as regards sales of an *entire* railroad. *Pittsburgh & Lake Erie Ry. Co. v. Ry. Labor Executives' Ass'n*, 109 S.Ct. 2584, 2596 (1989) ("[T]he decision of a railroad employer to go out of business and consequently reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of § 156."). The Seventh and

IV.

Unlike most minor disputes, the subject matter of this case is actually the subject of current collective bargaining by the parties. The Unions attempt to complicate the major/minor dispute analysis with references to this bargaining. We are unpersuaded by their argument.

Soon after April 1, 1988,[5] the Unions filed notices, pursuant to § 6 of the RLA (45 U.S.C. § 156), that they sought bargaining for new agreements concerning job security in the event of rail line transfers. The negotiations have proven fruitless, even with the RLA-prescribed assistance of the National Mediation Board. President Bush has recently created a Presidential Emergency Board, pursuant to RLA § 10 (45 U.S.C. § 160), to further mediate the dispute. Executive Order No. 12,714, 55 Fed. Reg. 19047 (1990).

The Unions rely primarily on these § 6 notices and the ensuing two years of negotiation to show that the dispute is "major." To be sure, that dispute over prospective contract rights is major. Accordingly, the railroad must maintain the status quo during those negotiations, and may not unilaterally impose an amendment to the collective bargaining agreement. The Achilles' heel of the Unions' argument is that the railroad's actions are "arguably justified" by the *existing* agreement. The service of a § 6 notice and the beginning of bargaining over the proposed changes does not convert a minor dispute into a major one. *General Committee of Adjustment v. CSX R.R. Corp.*, 893 F.2d 584, 594 (3d Cir. 1990); *CSX*

Eighth Circuits have extended this rule to line sales like the ones involved here. *Chicago & North Western Transp. Co. v. Railway Labor Executives' Ass'n*, Nos. 89-3265(L), slip op. at 12-13 (7th Cir., July 17, 1990); *Railway Labor Executives' Ass'n v. Chicago & North Western Transp. Co.*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 3237 (1990).

[5] April 1, 1988, was the expiration date of the moratorium on RLA § 6 bargaining notices, as set by the 1984 National Agreement to which nearly all railroads and unions were parties.

Transp., Inc. v. United Transp. Union, 879 F.2d 990 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 720 (1990). Therefore, the railroad's sales do not alter the status quo in violation of the RLA.

V.

Finally, the Unions argue that, notwithstanding that the dispute is minor and must be resolved through arbitration, the district court erred by not issuing an injunction to preserve the status quo. The Unions' logic is that, if they win the arbitration, they cannot get whole relief unless the status quo has been preserved in the interim.

To the extent this issue involves the W&LE or other past transfers, it is moot for the reasons we have stated above. In any event, the unions' assertions are meritless, and are rejected by all recent authority on point.[6] The very fact of arbitration presupposes that the railroad's interpretation will not always prevail; nonetheless, the RLA permits a railroad to proceed to operate under its interpretation of the agreement during the arbitration.[7]

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[6] *See, e.g., General Committee*, 893 F.2d at 593; *CSX Transportation*, 879 F.2d at 1004-05; *International Ass'n of Machinists v. Eastern Air Lines*, 826 F.2d 1141, 1145-51 (1st Cir. 1987). *Compare Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960) (district court may condition granting of strike injunction on railroad's maintaining status quo during arbitration).

[7] Because of our disposition of this case based on the district court's lack of jurisdiction over minor disputes, we decline to address the merit of its alternative holding that the employee protective measures the ICC must impose on § 11343 transactions are exclusive and displace the RLA. As the Supreme Court recently admonished:

> we "are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."
>
> * * * *
>
> It is urged that the [Interstate Commerce Act] provides a comprehensive scheme for resolution of labor protection issues

This appeal is dismissed to the extent it is moot. In all other respects, the judgment below is affirmed.

AFFIRMED IN PART AND DISMISSED IN PART

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arising out of ICC-regulated transactions and that rail labor must take advantage of those procedures rather than strike. We are unpersuaded that this is the case. . . . [N]o applicable provision has been called to our attention that imposes any duty on rail unions to participate in ICC proceedings and to seek ICC protections with which they must be satisfied. . . . We find nothing in the ICA that relieved [the railroad] of [its duty to bargain], nor anything in that Act that empowers the ICC to intrude into the relationship between the selling carrier and its railroad unions.

Pittsburgh & Lake Erie Railway Co., 109 S.Ct. at 2596, 2598 (1989) (citations omitted).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil No. 89-1157A

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Defendants.

ORDER

This matter comes before the Court on the parties' cross motions to Dismiss and for Summary Judgment. Moreover, defendants seek relief on their counterclaims for declaratory and injunctive relief.

Defendants advance various grounds in support of their motion. First, defendants assert that the Court does not have subject matter jurisdiction over this dispute as it is "minor" and therefore subject to mandatory arbitration, pursuant to 45 U.S.C. § 153. Second, defendants contend that plaintiffs' Section 6 notices created no "status quo" obligation, pursuant to the Railway Labor Act ("RLA"), barring defendants' from implementing the various leases and other trackage transactions in issue. Third, defendants argue that the railroad transactions authorized and conducted pursuant to 49 U.S.C. § 11343 are within the exclusive jurisdiction of the Interstate Commerce Commission ("ICC") and are not properly before this Court. Fourth, defendants claim that certain of plaintiffs' claims were filed outside the applicable statute of limitations

and are accordingly barred. And, fifth, defendants allege that two of the plaintiffs, Brotherhood of Locomotive Engineers and United Transportation Union, have waived any claims they may have had regarding the "VIP Trackage Rights" transaction.

For the reasons stated from the bench, and in a forthcoming memorandum opinion, defendants' Motion for Summary Judgment is GRANTED with respect to the first ground. The Court concludes that the dispute is "minor" and therefore subject to mandatory arbitration under 45 U.S.C. § 153. Accordingly, this Court does not have subject matter jurisdiction. *See* Rule 12(b)(1), Fed. R. Civ. P.

The Court also concludes that the Interstate Commerce Commission has exclusive jurisdiction over those transactions authorized and conducted pursuant to 49 U.S.C. § 11343. Thus, the Court finds an independent, alternative basis for not exercising its jurisdiction over those transactions.

In light of the Court's holding that it lacks jurisdiction over this matter the Court does not reach the other issues defendants raise concerning the complaint.

With respect to defendants' request for declaratory relief in the form of a strike injunction, the matter is TAKEN UNDER ADVISEMENT. Defendants are directed to file a brief, not later than *5:00 pm on Friday, March 2, 1990* addressing, *inter alia*, (i) the legal and factual bases on which they rely in contending that the Court should resolve the strike injunction matter at this time; (ii) the merits of the request for a strike injunction; and (iii) a full description of the means and methods available to plaintiffs under the law to compel defendants to bargain over the issue of successor agreement provisions. Plaintiffs' response is due not later than *5:00 pm on Monday, March 12, 1990.* Oral argument on these issues will be heard at *2:00 pm on Friday, March 16, 1990.*

The Clerk is directed to issue copies of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia

February 16, 1990

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TRANSCRIPT OF PROCEEDINGS

Civil Action No. 89-1157-A

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs-Counterclaim Defendants,

vs.

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Defendants-Counterclaim Plaintiffs.

2:00 p.m.
February 16, 1990

CROSS-MOTIONS FOR SUMMARY JUDGMENT
AND/OR DISMISSAL

BEFORE:

THE HONORABLE T. S. ELLIS, III,
Presiding United States District Court Judge

APPEARANCES:

For the Plaintiffs:

John O'B. Clarke, Jr., Esq.
David J. Strom, Esq.

For the Defendants:

Jeffrey S. Berlin, Esq.
Mark E. Martin, Esq.
William P. Stallsmith, Jr., Esq.

* * * *

[101] THE COURT: All right. To begin with, let me say that it is a pleasure to be presented with a number of challenging issues in a thorough and professional fashion as has occuurred today. The briefs were very good and the presentations were very good.

There's a reason why appellate courts only hear at most an hour of argument. There's just so much you can accomplish, or at least I always thought, through oral argument, although I have attended oral arguments in England that went on for six weeks but they had no written briefs and they read the cases together at the bench often and it was a strikingly different way to do things. And not having quite the oral tradition that they do, I can see advantages to our process.

But in any event, the briefs were very good and the oral presentations were also very good. And that's a pleasure. I hear a great many cases in this division. [102] Things move fairly briskly in this Court and we hear a lot of cases. And the range of presentations varies from the abysmal, more often than I would like to concede, to the excellent, and you all fall into the latter category. And I take occasion to say that because it is such a pleasure.

Now, inevitably, however, one of you will be happy and one of you will be unhappy. And the person, the one who is unhappy will inevitably go away thinking that the Court has not fully understood the problem. Indeed, you both may emerge. And I wouldn't be surprised, because it is not a simple problem. It has a surface simplicitly to it. There's a certain, there's a certain deceptive simplicity to it. It is in fact more complicated than that.

And indeed, I think that the excursion through the footnotes certainly underscored that because there is—what's going on here really is a decades-long struggle, as it were, over the interpretation of certain acts. And it is really a struggle over some fundamental—it's a fundamental struggle rather than a simple one.

All right. The defendant's motion to dismiss and for summary judgment is before the Court as is the plaintiff's cross-motion. Defendant asserts five grounds, both with respect to challenges to the Court's subject matter jurisdiction under 12(b)(1) and for summary judgment [103] on other issues.

I address first, of course, as I must, the subject matter jurisdiction issue which is fundamental to the Court's power to act.

Defendants argue that the dispute is a minor one and therefore subject to mandatory arbitration under Section 153. And we know from the *Conrail* case and others that whether a dispute is major or minor doesn't depend on the significance of the dispute. Minor disputes are those that may be conclusively resolved by interpreting existing agreements, and major disputes are disputes that seek to create new rights or duties outside the context of the collective bargaining agreement in its express or implied terms.

Minor disputes that cannot be resolved by normal in-house procedures must be referred for arbitration under the Section 153 First (i) to the NLRB [*sic*], the National Railway Labor Board. And arbitration, as we know from the statute and the cases, in this connection is compulsory and the jurisdiction of the board is primary and exclusive thereby depriving federal courts of subject matter jurisdiction.

The test to establish or to apply in determining whether a dispute is major or minor is set forth in the *Conrail* case. And it is, where an employer asserts a contractual right to take the contested action, the ensuing [104] dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where in contrast the employer's claims are frivolous or obviously insubstantial, the dispute is major.

Applying this test, the Court has concluded, after substantial reflection and review of the cases, that the dispute raised is a minor dispute because it is arguably capable

of being conclusively resolved by interpreting the existing agreements, either expressed or implied.

The current contract provisions do provide various procedures and rights in the event of employee furlough. And these furlough provisions purport to apply whatever the cause for the furlough.

Moreover, there is past practice, undeniable on the record, that makes clear that transactions of the sort in issue here which I reviewed earlier—namely, the sale, lease, and discontinuance of spur lines—makes clear that transactions of the sort in issue have been dealt with under these provisions in the past.

The existence of this—that is, the provisions and the practice under these provisions—means that the disputes concerning their content must be resolved by reference to them.

Now, in essence, what this means is that until [105] the unions and the railroads agree otherwise in the collective bargaining agreement, the functional equivalent of a successor agreement is what the railroads have been doing; namely, the application of the existing furlough.

Now, Section 6 notices do not alter this result. I think the Second Circuit put it well when it says they have no alchemizing effect—they're not magic—to change that result.

I was, however, interested and queried counsel about what was the effect of the Section 6 notices, whatever the past practice, whatever the status quo, the railroads—I mean the unions want to bargain, they want the railroads to bargain over whether there should be successor provisions.

This is a fundamental—it might be a fundamental disagreement, put in terms of whether the work should follow the location or whether it should follow—the workers should belong to the location or whether they go wherever the work is.

And I was assured by counsel that, in effect, there hasn't been a refusal to bargain about this, that bar-

gaining hasn't yet occurred and currently the National Mediation Board has the matter under advisement.

Is that correct, Mr. Berlin?

MR. BERLIN: In every respect, Your Honor.

[106] THE COURT: All right.

Now, having reached that conclusion, I'm going to write a memorandum opinion on this. It may take two weeks or more for the Court to get to it, but I will get to it as soon as I can. In the meantime, I will issue an order. The Court has no jurisdiction over the case and no subject matter jurisdiction.

Now, the defendants also argue that certain of the transactions are authorized and conducted pursuant to 11343 or 49 U.S. Code under which the Interstate Commerce Commission has issued certain orders imposing conditions, the so-called *Mendocino Coast* conditions, on those transactions.

And the Court was concerned about whether the major/minor analysis would apply to those or whether those had to be considered under a primary and exclusive jurisdiction argument.

There's no case really that directly confronts that issue. The Court therefore alternatively holds that as to those cases, that's an independent ground in those cases for the Court not exercising its jurisdiction over those cases.

And in the face of those conditions, at least the *Chicago & Northwestern* case, the Eighth Circuit case of 1963, indicates that the ICC's approval of a transaction, [107] subject to certain employee protective conditions, displaces the Railway Labor Act process for negotiating over rates of pay, rules, and working conditions. These disputes alternatively then go to the ICC for resolution under its scheme.

Now, the Court doesn't reach the statute of limitations issues or any of the other issues. It implicitly rules, of course, that the status quo issue—well, it doesn't reach that because it has no subject matter jurisdiction.

The Court notes, however, that the status quo in a sense is being maintained as to the pay, the wages, and the working conditions, which is to say that those employees' pay, wages, and working conditions are governed, in the Court's view, arguably by the collective bargaining agreement and as that's going on. The Court doesn't reach what would happen in this case if an arbitration board decides that this isn't something that they can arbitrate over. Nor does it reach what would happen in the event that there is a strike over the refusal of railroads to reach agreement or bargain over something of this sort.

All right. That concludes all the remarks that I'm going to make from the bench. I will issue a written decision and I will say again that the issue is not the easy one that I think might appear from the surface reading [108] of the decisions.

Footnote 17, Mr. Clarke, is indeed a puzzle. As I review Footnote 17—and it may be that I'll have cause to review it yet again if this matter is reversed. I find it difficult to believe that courts will end up distinguishing between whether a sale is complete or almost complete or very nearly complete or not very complete at all, whether every last thing has been sold.

Footnote 17, maybe, as I think you almost alluded to, maybe the votes aren't there to overrule *Telegraphers* but certainly the sentiment was there that if there's a way not to deal with it at this time, we don't want to deal with it.

But it seems clear from everything else in that decision and from the cases leading up to it, with the exception of that, that this case is getting out of that business. In other words, they're getting out of the, that particular spur line business by lease, discontinuance, or sale.

I also found the decisions of the Second and Third and the Seventh Circuits to be more persuasive than the Eighth Circuit decision. The Eighth Circuit decision, if the record was as complete there as it was in all of the others, then it's irreconcilable, and that is yet another issue for the Supreme Court to decide.

[109] If it is not, of course, then it's reconcilable by virtue of the fact that a decision was made on a factual record that was less complete than the others and perhaps improvidently made on that record and perhaps should have been returned for further record.

All right. Mr. Clarke, Mr. Berlin, is there anything further that the Court needs to accomplish today in this matter?

MR. CLARKE: Your Honor, we have—I realize that the trial is now off.

THE COURT: That's right.

MR. CLARKE: The one thing I'm curious about on the Court's ruling is there was also a request for a strike injunction, and is the Court ruling on that as well? Because I might add that in the Wheeling transaction that is now scheduled for—

THE COURT: Is that withdrawn, Mr. Berlin?

MR. BERLIN: Is the request withdrawn?

THE COURT: Yes.

MR. BERLIN: No, Your Honor. We would think the Court should rule on the Count I of the counterclaim consistently with your dismissal of the case.

THE COURT: There is no strike impending, is there?

MR. BERLIN: Your Honor, one was announced to us [110] as impending but, if I may, there's a request for declaratory relief in Count I. And that, we submit, the Court can and should rule on consistently with the dismissal of the complaint.

The declaratory judgment, Your Honor, would materially assist the parties in determining what their obligations are in the event a strike does impend if when this transaction comes about, something like that happens.

THE COURT: But who is to say the world won't look very different at that time in terms of anything that the National Mediation Board might do, anything that the railroad might consider prudent to do, anything that the unions might consider prudent to do? Why should this Court undertake now—when is this next sale?

MR. BERLIN: It's not going to happen within the next few weeks. I don't think we have a date on it yet.

MR. CLARKE: Well, there is a date. There were war [*sic*] notices, w-a-r—

MR. BERLIN: We won't make those dates.

MR. CLARKE: —that were put out to be March 14 or within a 14-day period beginning March 14.

MR. BERLIN: I'm authorized to say that the transaction is not going to occur before April. It may be later than that. There are numerous things to do before doing a transaction this large.

[111] Your Honor, the declaratory judgment is not different from the dismissal and stands on exactly the same foundation and requires no additional facts, and would decide for these parties what their rights are as regards to the—

THE COURT: But why isn't that contradictory to a finding of a lack of subject matter jurisdiction once I reach that point? Why should you have your cake and eat it too? If the Court has no jurisdiction because there are minor disputes, then why is there anything left?

MR. BERLIN: In both the Second and Third Circuit cases, Your Honor, relief was sought by counterclaim and obtained by the railroad along with a dismissal for lack of subject matter jurisdiction. We do have a controversy, the unions and the railroads, over whether their dispute over these transactions—

THE COURT: Well, what your answer should be then is, yes, the Court has no subject matter jurisdiction over that aspect of the plaintiff's claim, but the counterclaim has an independent jurisdictional basis. Is that what your're saying?

MR. BERLIN: That's right, Your Honor. The Railway Labor Act and the Declaratory Judgment Act complete that. And the facts are all the same. So that in deciding the one—

[112] The COURT: Well, I'm not persuaded that—and I'm certainly not going to rule on it this afternoon.

And I'm not persuaded that I need to rule on it in the foreseeable future. I'm more inclined to—indeed, I will not rule on it, as I said, today. It seems—let me have a copy of the—let me have the complaint back again, please.

All right. Well, I have the complaint. I'm not sure I have the amended—yes, December 12 is the amended. You didn't denominate it amended, did you?

MR. STROM: I believe it's denominated on the signature sheet, Your Honor.

THE COURT: Yes. But the title is Complaint for Declaratory Judgment. Now where is the counterclaim? Do you have a copy of the counterclaim?

MR. BERLIN: Yes, Your Honor.

THE COURT: All right. Hand that to the marshal, please.

All right. At page 20, paragraph 29, you say that you're entitled to a judgment declaring that it's minor. That's what it says under one. And under two, that's all paragraph 29(1) says, isn't it, Mr. Berlin?

MR. BERLIN: Your Honor, you're quoting from my copy.

THE COURT: All right. And the second—well, [113] it says that they're entitled to, defendants are entitled to a judgment declaring that the question whether they may engage in the sale, lease, or other disposition of the lines without first bargaining is a matter of interpretation or application of agreements subject to mandatory arbitration.

And then, second, an order enjoining the labor unions and the RLEA from attempting by strike, work stoppage, or otherwise to force the defendants to complete the process of bargaining in connection with the Section 6 notices served by the labor unions prior to selling, leasing, or disposing of lines of railroad.

The first aspect of that is covered by the Court's ruling where I've said it's a minor dispute.

Now, why is there an independent basis of jurisdiction, and then why is it so imminent that the Court should rule on it?

MR. BERLIN: Well, taking first the question of the declaratory relief which is, indeed, the mirror image of the dismissal for lack of jurisdiction, it is the same subject matter as covered by the dismissal but it amounts to a judgment on the nature of the dispute as opposed to a declination of jurisdiction. And we submit that Your Honor can do that.

THE COURT: Let me ask you—come to the podium, [114] Mr. Berlin. As you know, I was interested in the issue of how can the union get the railroads to talk about this change. They want a change in the situation. They want, instead of these furlough provisions applying, they want a successor provision that says that the work, if you sell, lease, or discontinue—not discontinue presumably—but if you sell or lease, somebody else does the work, that before you can let anyone else do the work, you've got to rehire these same folks under the same collective bargaining agreements.

How do they get the railroads to talk about that with them?

MR. BERLIN: Well, they serve Section 6 notices as they have.

THE COURT: All right. Now what happens next?

MR. BERLIN: Not everything in every Section 6 notice, Your Honor, is a proper subject of mandatory bargaining.

THE COURT: All right. So you sit down to bargain and the union says, we want to talk about this. The railroad says, we don't want to talk about it.

MR. BERLIN: That sometimes happens.

THE COURT: All right. Now, if that happens, am I correct that one remedy the union has under those circumstances is to say, you don't want to talk about that, [115] fine, we strike.

MR. BERLIN: Not quite, Your Honor. The process for resolving the then major dispute triggered by the service of the notice requires going to the National Mediation Board if either party so requests or the board takes jurisdiction of it.

THE COURT: Is that where it is now?

MR. BERLIN: Yes, Your Honor, along with other notices served as long ago as 1984. There is a package of ongoing disputes over bargaining proposals from both sides currently in the hands of the mediation board and positions have not been taken—

THE COURT: Now, is there some basis once a Section 6 notice is filed and the matter is referred to the National Mediation Board, is there some provision of the law that precludes strikes on that issue until the National Mediation Board is concluded?

MR. BERLIN: Yes.

THE COURT: Of course there is. And what section is that?

Mr. BERLIN: Well, Section 6 and Section 10 operate during the pendency of mediation proceedings and thereafter—Section 5, sorry. Section 5 applies to the mediation board proceedings.

THE COURT: Well, I'll tell you what I'm going to [116] do, Mr. Berlin. I think you have a clear view of the Court's concern, which is to say that there ought to be a mechanism in the law where these unions can get to talk to the railroads about changing the world the way they want to change it. It's a pretty fundamental change. And they want to talk about that. And it seems to the Court that if the railroad doesn't want to talk to it, one of the remedies that they have absent mediation is strike.

At the risk of imperiling several other forests, I'm going to require the parties to file additional briefs on this issue; that is, on the issue of paragraph 29, I think it's 29(2). I'll hand it back to you.

MR. BERLIN: 29(1) is the declaration, 29(2) the strike injunction.

THE COURT: Yes. Well, the declaration, however, is nothing more than what the Court is giving when the

Court grants the motion to dismiss under 12(b)(1); that is, perforce the declaration that it is a minor dispute and must go to mandatory arbitration. So that's not what you're asking for. What you're asking for is two, 29(2).

And on that, I' going to require additional briefs—you might try to be no less thorough but perhaps a little more succinct—on the issue of why the Court should resolve that now, why is it so immediate, and indeed, why is there a right to that now. Because I have [117] in mind absent, as you pointed out, I have, absent a National Mediation Board type bar to a strike while they're considering, I have in mind that, fairly simple-mindedly that the general overall scheme is that if the union wants something and they can't get it, one of their remedies is strike. And if there are impediments to that, then this gives you an opportunity to call them to my attention.

So you'll file your brief two weeks from today, by the close of business two weeks from today. And the response—let's see, that would make it March 2. And the response would be due—how long will it take the response?

MR. CLARKE: Your Honor, we would get it in within one week.

THE COURT: All right. Then the response—I'll tell you what. I will give you until the 12th, the close of business the 12th. That was always awful for me to hear on the other side of the bar because it destroyed a weekend.

But in any event, that will allow me to hear oral argument on the 16th at 2 p.m., the 16th of March at 2 p.m. And I set those dates because I think those are well in advance of any transaction that may occur or any need for any injunction. I think you have, I think you have the Court's concerns about it.

[118] MR. BERLIN: Yes. Thank you, Your Honor.

THE COURT: All right. Anything further in this matter today?

MR. BERLIN: No, Your Honor.

MR. CLARKE: No, Your Honor.

THE COURT: All right. I thank counsel again for their cooperation in this case. Court stands adjourned until 9 o'clock Tuesday morning.

[The above matter was concluded at 6 p.m.]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINA
Alexandria Division

Civil Action No. 90-1157-A

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Defendants.

ORDER

By Order dated February 16, 1990, this Court granted defendants' Motion for Summary Judgment on the ground that the dispute presented was "minor" and therefore subject to mandatory arbitration under 45 U.S.C. § 153. The Court, accordingly, had no subject matter jurisdiction. An alternative ground, also stated, was the exclusive jurisdiction of the Interstate Commerce Commission. The Court then took under advisement defendants' counterclaim request for declaratory relief in the form of a strike injunction, ordered further briefing and scheduled a hearing. Thereafter, by Order dated March 30, 1990, the Court, following oral argument on that date, took defendants' injunction request under advisement and noted that as defendants had represented that no strike was then imminent, the Court would withhold its ruling on defendants' injunctive relief request until the issuance of a memorandum opinion. More recently, plaintiffs filed a motion on May 7, 1990 seeking to enjoin the Wheeling transaction or, in the alternative,

a reconsideration of their earlier motion. Plaintiffs requested a ruling on this motion as soon as possible.

On the basis of the parties' briefs and oral arguments, the Court concludes that there is no legal basis for the issuance of the injunctive relief sought by plaintiffs. In a related case the Court has denied plaintiffs' request for an injunction to stop the Wheeling transaction. *Railway Labor Executives' Ass'n. et al. v. Wheeling Acquisition Corp., CA No. 90-0597-A.*[1] Moreover, in February the Court dismissed plaintiffs' action for lack of subject matter jurisdiction after ruling that the dispute presented was "minor" and therefore subject to mandatory arbitration under the RLA. In the course of reaching that decision, the Court rejected arguments, that plaintiffs' various notices triggered any status quo rights under the RLA. Plaintiffs advance no new persuasive legal argument, nor have they cited any authority that would support the injunctive relief they seek. Accordingly, the plaintiff's request for injunctive relief should be, and the same hereby is, DENIED.

Defendants' request for injunctive relief stands on a different footing. The Court has already ruled that the RLA commits the resolution of "minor" disputes exclusively to binding arbitration. 45 U.S.C. § 153. In this connection, it is well settled that strikes over minor disputes violate the RLA and that federal district courts have jurisdiction to enjoin such strikes. *Consolidated Rail Corp. v. RLEA*, 109 S. Ct. 2477, 2481 (1989) ("[c]ourts may enjoin strikes arising out of minor disputes"); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 42 (1957); *Norfolk & Portsmouth Belt Line R.R. v. Brotherhood of Railroad Trainmen*, 248 F.2d 34, 40, 43, 46 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958). Because injunctions in this context serve to preserve and ensure RLA § 3 com-

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[1] A Memorandum Opinion will issue today in that case.

pliance, the provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, do not block the issuance of such relief. *Brotherhood of Locomotive Engr's v. Louisville & Nashville R.R.*, 373 U.S. 32, 41-42 (1968); *Chicago River*, 353 U.S. at 39-42. Thus courts on a number of occasions have enjoined strikes over minor disputes. *Flight Engineers Int'l Ass'n v. American Airlines, Inc.*, 303 F.2d 5, 13 (5th Cir. 1962); *see Norfolk & Portsmouth Belt Line R.R. v. Brotherhood of Railroad Trainmen*, 248 F.2d at 40, 46 (strikes over minor disputes "are neither contemplated nor permissible;" where dispute was minor, "resort by the Brotherhoods to a strike was not lawful and a permanent injunction should be entered"); *General Committee of Adjustment, UTU v. CSX R.R.*, No. 89-5246, slip op. at 23-24 (3d Cir. Jan. 5, 1990); *CSX Transport., Inc. v. United Transport. Union*, 879 F.2d 990, 1004 (2d Cir. 1989) (permanent injunction), *cert. denied*, 110 S. Ct. 720 (1990); *Chicago & North Western Transport. Co. v. RLEA*, 855 F.2d 1277, 1288 (7th Cir.) (preliminary injunction), *cert. denied*, 109 S. Ct. 493 (1988); *see also Main Central R.R. v. United Transport. Union*, 787 F.2d 780, 784 (1st Cir.) (concluding that controversy over lease of rail line presented a minor dispute and remanding with instructions to enter an order enjoining unions from striking), *cert. denied*, 479 U.S. 848 (1986); *Atchison, Topeka & Santa Fe Ry. v. RLEA*, Nos. 90-1383, 90-1438 (7th Cir. February 20 and 27, 1990).

Although the power of courts to enjoin strikes over "minor" disputes is clear, such injunctions should not issue absent a showing that such a strike is imminent or likely. Plaintiffs, at the last hearing, indicated that no such strike was planned or imminent. Accordingly, the Court declines at this time to issue the relief defendants request. Defendant's request for injunctive relief, therefore, should be and the same hereby is, DE-

NIED. Should circumstances change, however, defendants may again seek the relief requested.[2]

The Clerk is directed to issue copies of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia

May 15, 1990

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[2] The Court notes that defendants have filed a new request for relief, which the Court has set for hearing at 9:00 a.m., Thursday, May 17, 1990. As defendants recognize, any injunctive relief issued in response to defendants' request must be framed to ensure that it does not infringe on any rights plaintiffs may acquire in the future in connection with the issues now in mediation under the auspices of the National Mediation Board.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-1157-A

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Defendants.

MEMORANDUM OPINION

Introduction

This Railway Labor Act ("RLA") dispute, brought by fourteen labor unions and the Railway Labor Executives' Association ("RLEA") against a group of railroads, grows out of the railroads' sale, lease, and abandonment of various of the railroads' spur lines. Plaintiffs contend that defendants violated their duties under the RLA (i) to exert every reasonable effort to settle all disputes, maintain agreements and bargain only with designated employee representatives; (ii) to give written notice to bargain with its employees' representatives regarding defendants' decision to enter into intra-corporate leases and trackage rights agreeements; and (iii) to comply fully with RLA bargaining and status quo obligations triggered by Section 6 notices when defendants discontinued operations and implemented lease transactions and trackage rights agreements. The defendant railroads deny plaintiffs' contentions and contend instead that the Court lacks

subject matter jurisdiction because the parties' dispute is arguably over the interpretation and application of existing labor agreements and the RLA requires that such so-called "minor disputes" be resolved exclusively by arbitration. Defendant railroads further counterclaim for a permanent strike injunction to prevent the unions and RLEA from "attempting, by strike, work stoppage, or otherwise, to force [the railroads] [1] to complete the process of bargaining" with the unions in connection with the Section 6 notices served by the unions prior to "selling, leasing, or otherwise disposing of" railroad lines.

The parties filed cross-motions for summary judgment and, as there were no disputed issues of material fact, the Court, on February 16, 1990, ruled that it lacked subject matter jurisdiction because plaintiffs' complaint indeed presented a "minor dispute" under the RLA. Accordingly, the Court dismissed the labor plaintiff's claim and left the parties to their RLA arbitration remedy. Arbitration proceedings are currently ongoing.[2] As an alternative basis for summary judgment, the Court also concluded that the Interstate Commerce Commission ("ICC") has exclusive jurisdiction over transactions authorized and conducted pursuant to 49 U.S.C. § 11343. Finally, the Court held in abeyance defendants' request for an injunction to prevent plaintiffs from engaging in self-help or striking over the minor dispute. An appropriate order issued reflecting these rulings.[3] The Court gave the parties leave to file further briefs regarding the propriety of the Court's granting injunctive relief. Both parties filed briefs and the Court heard oral argument. As defendants

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[1] Norfolk Southern Co., Norfolk & Western Railway Co., and Southern Railway Co.

[2] Not until May 2, 1990 did plaintiffs initiate the arbitration process by seeking a special Board of Adjustment under § 3, Second of the RLA. Defendants there claim that plaintiffs' submitted issues are not arbitrable. The matter is now before the NMB.

[3] See Order dated February 20, 1990.

represented that no strike was then imminent, the Court, by Order dated May 15, 1990, declined to grant injunctive relief. This Memorandum Opinion records the Court's reasons for its February 16 and May 15 decisions.[4]

Background

Plaintiffs consist of the RLEA, an unincorporated association of the chief executive officers of seventeen national and international railway labor unions of the United States, and fourteen individual rail labor unions that represent defendants' employees for the purposes of collective bargaining. These entities are collectively referred to as the "labor plaintiffs."

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[4] Rapidly developing events have largely overtaken this Memorandum. After the Court's February 16th dismissal of the complaint for lack of subject matter jurisdiction, the labor plaintiffs filed an action against the Wheeling Acquisition Corporation ("Wheeling"), the purchaser of certain Norfolk & Western Railway Company lines in an effort to block the lines' sale and compel Wheeling to bargain with the labor plaintiffs over the hiring and assignment of the new Wheeling employees. After permitting the intervention of Norfolk & Western Railway Co., the Court denied the labor plaintiffs' TRO request to block the lines' sale to Wheeling and dismissed Count I of the labor plaintiffs' complaint against Wheeling on the ground that Wheeling was not then a "carrier" under RLA and hence not required to bargain with the labor plaintiffs concerning the hiring, assignment, rates of pay and seniority of its new employees. *See RLEA, et al. v. Wheeling Acquisition Corp.*, —— F. Supp. —— (E.D.Va. 1990). The intervenor in the *Wheeling* case filed a counterclaim and sought a TRO to prevent the labor plaintiffs from engaging in self help strike action designed to shut down the operations of Wheeling and the Norfolk & Western Railway Co. at three important interchange points. After hearing testimony and oral argument, the Court granted the TRO on May 17, 1990. Next, on May 23, 1990, after hearing additional testimony and oral argument, the Court issued a preliminary injunction enjoining the labor plaintiffs from engaging in strike activity to shut down the operations of Wheeling and Norfolk & Western operations.

Defendants are transportation holding companies and common carriers by rail [5] that operate rail lines in the Mid and South Atlantic region of the United States and within this Court's jurisdiction. Norfolk Southern Corporation ("NS") is the holding company that controls Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern"). NS operates these railroads as a coordinated system often referred to as the "NS system." Chesapeake Western Railway Company ("CW"), a subsidiary of NW, is also part of the system.

This dispute was spawned by a series of sales and leases of certain NS track lines. While the details of these transactions are not material to the disposition of the case, a brief summary is included as explanatory background.

1. *The "Thoroughbred Short Line" Program*

NS has determined that some lines within its railroad system have so little traffic originating and terminating on them that they are unprofitable to operate. Other NS lines are marginally profitable today, but would require substantial capital investment for continued operation. NS has therefore determined that it must dispose of these two categories of lines by way of sale, lease or abandonment. If the lines are not disposed of to an entity who will continue their rail service, shippers and others served by the lines may lose their access to rail service.

By October, 1987 NS had identified approximately 2700 miles of unprofitable or marginally unprofitable lines. NS further determined that 1500 miles of this total had no potential for profitable operation by anyone and had to be abandoned. The remaining 1200 miles were judged to

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[5] Defendant railroads are "carriers" under the RLA, 45 U.S.C. §§ 151 *et seq.*, and the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10102(4).

have the potential for profitable operation by "short line" operators. NS therefore decided to lease these lines, typically for 20 year periods, on terms requiring relatively low initial investments by the short line operators and providing incentives for the operators to maintain the flow of traffic connecting with the NS system. Specifically, the leases are designed to establish a rental obligation that produces a reasonable return based on the line's liquidation value, but also to provide for a credit against rental payments for every rail car interchanged with NS. This credit is calculated so that if the new operator produces traffic equal to the traffic on the line in recent years, the operator pays no rent at all. This leasing program, entitled the "Thoroughbred Short Line" ("TSL") program, was approved by NS management in early 1988, and implemented immediately.

The first TSL lease, consummated in November, 1988, involved 72 miles of line in Virginia. Since the initial lease, NS and its subsidiaries have completed 14 such leases, involving an aggregate of approximately 810 miles of line.[6] Additional TSL leases are planned. Generally, the TSL leases have been carried out pursuant to ICC authorization. A provision of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11343, governs, *inter alia*, transfers of rail lines from one carrier to another. Ordinarily, transactions subject to § 11343 may be carried out

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[6] One such lease is the "CCR" lease. That transaction arose on January 30, 1989, when the Carolina Coastal Railway, Inc. ("CCR") filed a Verified Notice of Exemption, pursuant to 49 C.F.R. § 1150.31-34, stating that it would acquire from Southern, by lease or purchase, a 17-mile section of rail line between Pinetown and Belhaven, North Carolina. At that time, Southern employees performed all work on the Pinetown to Belhaven line under collective bargaining agreements negotiated between their designated representatives and Southern. On February 6, 1989, pursuant to ICC regulations, the transaction was exempted from ICC review and approval and CCR assumed operations on the line pursuant to a lease with Southern. CCR employees have performed all work on the line since CCR assumed the line's operations.

only after the participants receive prior ICC approval. Under 49 U.S.C. § 10505, however, the ICC exempts certain transactions from the prior approval requirement of § 11343. Exemptions were sought and obtained for all TSL leases subject to § 11343. In all such cases, 49 U.S.C. § 10505(g) requires that the ICC impose extensive "employee protective conditions," required by 49 U.S.C. § 11347 on these transactions. These conditions, often called the "*Mendocino Coast*" [7] conditions, provide an array of compensatory benefits for employees adversely affected by a line sale or transfer transaction. In two of the lease transactions, including the CCR lease, the lessees were companies that were not already classified as "carriers" under the ICA. These transactions with "non-carriers" were not subject to § 11343 but, instead, were governed by 49 U.S.C. § 10901. The ICC generally does not impose employee protective conditions on transactions authorized under § 10901 and did not do so in this case.

2. *Other Sales and Leases to Unaffiliated Parties*

The largest line disposition planned by NS was "Ohio/P&WV" transaction. This transaction involved NW's sale of approximately 440 miles of line owned in Ohio and the sublease of approximately 121 miles of line in Ohio, West Virginia, and Pennsylvania now leased by NW from the Pittsburgh and West Virginia Railroad ("P&WV"), a company not affiliated with NS. The purchaser/sublessee in the transaction, Wheeling Acquisition Corporation ("Wheeling") is also not affiliated with NS. Wheeling was a "non-carrier" under the ICA and, as such, was initially subject to ICC authorization under § 10901. On January 12, 1990, Wheeling filed the statutorily required "Notice of Exemption" with the ICC. The labor plaintiffs sought unsuccessfully to block this transaction. *See supra*

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[7] *See Mendocino Coast Ry—Lease & Operate—California Western R.R.*, 354 I.C.C. 732 (1978), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom., RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

note 4. Wheeling commenced operations as a "carrier" on May 18, 1990.

3. *NS Intra-corporate Transactions*

a. *The CW lease*

On January 24, 1989, Southern and CW gave notice to the ICC of their intention to engage in an intra-corporate lease [8] of Southern's rail lines between Harrisonburg and Mount Jackson, Virginia to CW. In addition to that lease, Southern noted its proposed abandonment of operations on 5.1 miles of rail line between Mount Jackson and Edinburg, Virginia. In February, the ICC noted that the intra-corporate lease was "specifically exempted from prior [ICC] review and approval" and that on or about March 15, 1989, Southern and CW would implement the lease and Southern would discontinue its operations on the Mount Jackson to Edinburg line. On April 15, 1989, Southern abolished the train and engine crew positions staffing the Strasburg to Harrisonburg freight train and the "mobile agent" and "agent-operators" positions headquartered at Harrisonburg. Then, two days later, Southern transferred operations between Mount Jackson and Harrisonburg to CW. Since April 17, 1989, CW employees have performed all work on the leased line. Prior to that time, Southern employees performed all the work on the leased lines. Defendant railroads claim CW employees are not represented by a labor organization and perform work at lower labor costs than Southern employees.

b. *The VIP Trackage Rights Transaction*

Southern, N&W and the Virginia Port Authority are parties to an agreement that provides for both carriers to render rail service between the Virginia Island Port

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[8] CW's rental "payments" to Southern for the line lease consist primarily of CW's assumption of Southern's statutorily mandated common carrier obligations to provide service over the line.

("VIP") in Front Royal, Virginia and the Norfolk International Terminals ("NIT") in Norfolk, Virginia. In reaching this agreement, NW negotiated new labor agreements with the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") which represent the NW employees who man the trains used to provide this service. In one of these agreements, the parties agreed that N&W trains operating between the VIP and NIT could be operated with only an engineer and a conductor. This is in contrast to the predecessor agreements which required an engineer, a conductor and a brakeman. Finally, on March 14, 1989, Southern and N&W filed a verified notice with the ICC exercising an intra-corporate class exemption from ICC review and approval of their proposed trackage rights agreement permitting N&W to operate its trains, with N&W crews, over Southern tracks as part of the VIP-NIT contract service.

The plaintiff rail labor unions responded to these proposed transactions in January 1988 by serving notices on Southern, N&W and NS seeking to add so-called "successor provisions" to the then-existing collective bargaining agreements. Specifically, the notices sought new terms that would (i) provide compensation guarantees for present employees; (ii) require economic protections for employees in the event of an intra-corporate lease of rail property; and (iii) provide for the assumption of existing collective bargaining agreements by any purchasers, lessees or operators of Southern, N&W or NS rail lines. Plaintiffs commenced this action on August 4, 1989 alleging that defendants violated RLA obligations when they implemented leases and other transactions after the unions served defendants with the § 6 notices proposing to modify their labor agreements to require bargaining over such transactions.

Analysis

I. *Minor Dispute*

The well-settled, dispositive principle operative here is that courts are without jurisdiction where, as here, the controversy presented is properly categorized as a "minor dispute" under the RLA. The "major"—"minor" dispute dichotomy grew up in RLA jurisprudence as a means of distinguishing between those disputes requiring arbitration and those requiring bargaining. Whether a dispute is "major" or "minor" depends not on the dispute's importance, but rather on its relationship to existing collective bargaining agreements. *Consolidated Rail Corp. v. RLEA*, 109 S.Ct. 2477, 2480-81 (1989) (*"Conrail"*); *Dement v. Richmond, Fredericksburg & Potomac R.R. Co.*, 845 F.2d 451, 462 (4th Cir. 1988) (*"Dement"*). Major disputes are those disputes concerning "rates of pay, rules, or working conditions." 45 U.S.C. § 156. The parties to major disputes seek to create new contractual rights. Such disputes, therefore, and [*sic*] cannot be resolved by reference to existing labor agreements. *Conrail*, 109 S.Ct. at 2480; *Dement*, 845 F.2d at 462. Thus, the RLA contemplates that major disputes will be settled by the parties through a mandatory, protracted process of negotiation, mediation, voluntary arbitration, and conciliation, during which the status quo must be maintained. If, ultimately, the parties cannot agree, they are free to resort to "the use of economic force," *i.e.*, strikes or self help. *Conrail*, 109 S.Ct. at 2480.

Minor disputes, by contrast, grow out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153. Parties to minor disputes seek vindication of existing contract rights. Such disputes "may be conclusively resolved by interpreting" existing agreements. *Conrail*, 109 S.Ct. at 2480. Minor disputes that cannot be resolved by the prescribed labor agreement procedures

must be referred for arbitration to the National Railway Arbitration [*sic*] Board ("NRAB"), or to a special board of adjustment created by the carrier and the union.[9] 45 U.S.C. § 153 First (i), Second. Thus, arbitration of minor disputes is compulsory and the boards' jurisdiction to resolve them is primary and exclusive. *Conrail*, 109 S.Ct. at 2480-81; *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322 (1972); *Dement*, 845 F.2d at 462.

Where, as here, the parties disagree as to the nature of the dispute, it is the Court's role to determine if it is "major" or "minor." In so doing, the Court must apply the Supreme Court's *Conrail* test:

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor *if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.*

109 S.Ct. at 2482 (emphasis added). But reference to the collective bargaining agreement is not limited to its express, written terms; implied terms may also be considered. *Conrail*, 109 S.Ct. at 2485 (finding minor dispute solely on the ground that contested action was arguably justified by "implied contractual terms, as interpreted in light of past practice"); *See also Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891, 896 (D.C. Cir. 1988) (court must consider express contract in light of past practices), *aff'd*, 889 F.2d 291 (D.C. Cir. 1980); *RLEA v. Norfolk & Western Ry. Co.*, 833 F.2d 700, 705-06 (7th Cir. 1987) (parties' collective bargaining agreement "includes both the specific terms set forth in the written agreement and any well established practices that

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[9] Unlike major disputes, minor disputes do not require that the carrier maintain the status quo. Instead, the carrier may act on its interpretation of existing agreements pending the adjustment board's decision. *Conrail*, 109 S.Ct. at 2481 and n. 5, 2484.

constitute a 'course of dealing' between the carrier and employees").

Determination of a dispute's major or minor character does not require a court to choose among contract interpretations. *Conrail*, 109 S.Ct. at 2489; *Norfolk & Portsmouth Belt Line R.R. Co. v. Brotherhood of R.R. Trainmen Lodge No. 514*, 248 F.2d 34, 43 (4th Cir.), *cert. denied*, 355 U.S. 914 (1958). Indeed, it is not open to the court to determine which party's asserted contractual interpretation is correct. The court must merely determine if the dispute *is capable* of resolution by reference to the agreement, without regard to the substantive merits; interpretation is the arbitrator's role. *Conrail*, 109 S.Ct. at 2489. This is a "relatively light burden" for the carrier to satisfy. *Conrail*, 109 S.Ct. at 2482. Once satisfied, the court's inquiry ends and the claim must be dismissed for lack of subject matter jurisdiction. *Id.*, *Kushto v. Brotherhood of Ry., Airline and S.S. Clerks Freight Handler, Exp. and Station Employees*, 818 F.2d 290, 193 (4th Cir. 1987). This burden is satisfied here.

NW, Southern, Southern's subsidiaries, and the plaintiff unions are parties to written labor agreements governing the rates of pay, rules, and working conditions of union-represented NW and Southern employees. NS is a party to a similar labor agreement with its TCU represented employees. In none of these agreements is there any restriction on the right of the carrier to sell, lease, abandon, or grant trackage rights over its rail lines. Nor do the agreements obligate NS, NW, or Southern to require that a purchaser or lessee of a rail line assume the parties' existing collective bargaining agreements, or hire the carriers' employees. Rather, recognizing that a carrier's discontinuance of operations may cause jobs and work assignments to be eliminated or reduced and employees to be reassigned to different positions, the agreements include provisions, in various forms, explicitly reserving to NS, NW and Southern the flexibility to abolish

jobs and furlough employees as a result of a sale, lease, abandonment, or other disposition of a rail line.[10] Thus,

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[10] Defendant railroads submitted excerpts of the force reduction and furlough provisions from ninety labor agreements pertinent to the challenged transactions. The provision excerpted from the agreement between Southern and many of its subsidiaries and the Brotherhood of Maintenance of Way Employees ("BMWE"), effective July 1, 1986, is typical. Rule 36(b) and (c) of that agreement states:

> (b) When an employee is cut off in a force reduction, or his position or assignment is abolished, or he is displaced, as herein provided, qualifications being sufficient, he shall either (1) displace any employee his junior employed in any seniority rank in which he holds seniority in the same sub-department and seniority district within thirty (30) days from the date affected, or (2) file his name and address as provided in Rule 38 of this agreement re: Notice of Desire to Retain Seniority.
>
> (c) An employee who bids upon and is awarded a temporary vacancy shall, upon his displacement therefrom, return to position or assignment last held, if still in existence, unless it is held by a senior employee who obtained the same in the exercise of a displacement right; if such position or assignment is so held by such senior employee, or is no longer in existence, such displaced employee may exercise a displacement right as provided in paragraph (b) hereof.

Another Southern agreement is similarly typical:

> (a) When forces are reduced and/or positions are abolished, at least five (5) working days advance notice shall be given employees affected thereby, except as otherwise provided in paragraphs (c) and (d) of this rule. An employee whose position is abolished may exercise his seniority rights by displacing a junior employee on a position for which he is qualified; other employees affected may exercise their seniority rights in the same manner. Except as otherwise provided in Rule E-1(k), employees displaced, whose seniority rights and qualifications entitle them to regular positions, may assert such rights within fifteen (15) days. Employees who do not possess sufficient seniority or qualifications to displace a junior employee or who do not assert their displacement rights within the prescribed time limit shall be considered as furloughed; provided, however, employees in seniority districts

NS, NW, and Southern may unilaterally abolish positions and furlough employees subject only to the limited constraints prescribed in the agreements. These constraints typically require that employees receive advance notice of job abolishment [11], and that furloughs occur in reverse

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having extra boards covered by Rule E-6 will go to the extra board.

(b) When forces are reduced, the position to be abolished shall be the position or positions which are no longer needed; if there be two or more positions doing the same kind of work paying different rates in the office where such abolishment is to be effected, the position paying the lowest rate shall be abolished. In reducing forces, where there are two employees in the same office assigned to the same class of work, working the same hours and receiving the same rate of pay and one of the positions is to be abolished, it will be the position held by the junior employee.

* * * *

(g) Nothing in this rule shall affect or prevent the abolishment of positions at any time, except as otherwise provided in this rule.

Agreement between Southern and BRAC, effective May 1, 1973, Rule B-14.

Yet another example is the agreement between NW and BMWE, effective July 1, 1986. Rule 14(a) of the agreement provides that "not less than five working days' notice" will be given "before force reductions are made," and Rule 14(c) provides that "when reducing force, seniority shall govern, first laying off junior employees of the same Class in the gang or at the point where reduction is to be made." Rule 14(b) provides that "When force reductions are made, positions are abolished or displacements occur, employees affected" (with a specified exception) shall "exercise their seniority" within ten days and "shall exhaust all seniority rights before being considered furloughed . . . ."

[11] *See, e.g., NW and Brotherhood of Maintenance of Way Employees Agreement Rule 14(a)* (effective July 1, 1986) ("not less than five working days' notice" will be given "before force reductions are made"); *Southern and Brotherhood of Railway, Airline and S.S. Clerks (now TCU) Agreement Rule B-14(a)* (effective May 1, 1973) ("when forces are reduced and/or positions are abolished, at least five (5) working days advance notice shall be given").

seniority order [12]. The parties' agreements generally contain detailed procedures addressing the effect on, and right of, employees when the carrier abolishes a job.[13] In addition, some employees are covered by agreements that provide specific income guarantees or other property protections against economic loss in the event of a displacement or transfer.[14] It is not significant that the reduction in force, furlough, and related agreement provisions do not expressly note that they apply to line dispositions. Those provisions are broadly worded and contain no limiting language suggesting their inapplicability to sales, leases, or other line dispositions.

The parties' past practices support defendants' contention that employment issues stemming from spur line abandonments, sales and leases do not require pre-transaction RLA bargaining, but instead are governed by the furlough and reduction in force provisions in the parties' collective bargaining agreements. The parties in the past have consistently relied on these collective bargaining provisions to govern in the case of such line dispositions. Often over the past twenty years, Southern and NW have ceased operations over marginal rail lines, by abandonment, sale and lease, and concurrently abolished jobs,

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[12] *See, eg. NW and Brotherhood of Maintenance of Way Employees Agreement Rule 14(c)*, (effective July 1, 1986) (when force reductions are made, positions are abolished or displacements occur, employees affected" shall "exercise their seniority" within ten days and "shall exhaust all seniority rights before being considered furloughed. . .")

[13] *See, e.g., supra* note 10.

[14] *See, e.g., NW & BRAC (now TCU) §§ 1(c), 3(d)*:

> An April 7, 1965 Memorandum Agreement between NW and BRAC (now TCU) recognizes the right of the carrier to effect a force reduction in the event there is a decline in business (section 1(c)) (and to transfer of work throughout the merged system. That agreement also gives the affected employee the option to follow the work with moving benefits, exercise his seniority, or receive a lump-sum separation allowance (section 3(d)).

furloughed, and reassigned employees without first negotiating with the unions.[15] Those line dispositions had a ripple effect beyond the jobs directly affected as they caused employees to exercise their seniority rights to bid for other jobs. Yet the labor plaintiffs in these circumstances never claimed that RLA bargaining had to precede the line dispositions. Instead, the parties resolved any line disposition employment issues by relying on the collective bargaining agreement provisions governing furloughs and reductions in force. This consistent past practice furnishes persuasive support for defendants' claim

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[15] The record reflects that on more than ninety occasions since 1970, Southern and its subsidiaries have abandoned or discontinued service over 1,500 miles of rail lines without bargaining under the RLA. Similarly, the record further reflects that since 1973, NW has discontinued or abandoned rail service over 1,200 miles of rail lines without first bargaining under the RLA. In all of these instances the parties apparently relied on labor agreements to resolve any employment issues growing out of the abandonments.

This pattern of acquiescence is not limited to line abandonments. It exists in the case of sales and leases as well. On at least three occasions since 1984, NW or Southern, without prior RLA negotiations, coupled line abandonment with an immediate line sale to either an affiliated line or an unaffiliated third party for continued operations. Although the new rail operator operated the line with its own employees and pursuant to its own work arrangements, the labor plaintiffs never contested the transactions or the absence of pre-transaction RLA bargaining.

The record reflects a number of other, similar examples. On a number of occasions in the past, Southern and its subsidiaries, without RLA negotiations with their unions, have reduced their operations by selling or leasing marginal or unprofitable rail lines to other companies under the TSL program. NW has sold or leased such lines on at least seven occasions. In these instances, as on other occasions, the purchaser or lessee has operated the line with its own employees and under its own work arrangements. None of these carriers assumed Southern's or NW's labor agreements. And again, the labor plaintiffs did not (until now) contest any of these transactions and insist on pre-transaction RLA bargaining. Employee disputes arising from these transactions were apparently resolved on the basis of existing collective bargaining agreements.

that the collective bargaining agreement provisions are sufficiently broad to cover the employment issues spawned by the line transactions in issue. And importantly, as noted above, the Court need not hold conclusively that defendants' proposed interpretation of the agreements is correct. Rather, the Court need only find, as it does, that defendants' suggested interpretation is at least arguably correct.

Ample case law supports this conclusion. Courts in the Second, Third and Seventh Circuits have found essentially identical disputes to be "minor," based on the parties' collective bargaining agreement provisions and their past practices. Thus, in *General Comm. of Adjustment, United Transp. Union Western Maryland Ry. Co. v. CSX R.R. Co.*, 893 F.2d 584 (3d. Cir. 1990) (*"UTU v. CSX"*), a union filed an action challenging the railroad's right to sell a rail line without first bargaining under the RLA over a union § 6 notice addressing line sales. The Third Circuit held the action presented a "minor dispute" over which federal courts had no subject matter jurisdiction. The sole remedy, according to the court, was arbitration pursuant to RLA § 3, 45 U.S.C. § 153. In reaching these conclusions, the court relied on the reduction in force and furlough provisions in the existing agreements and on a pattern of past practice of applying these provisions in three line sales and twenty-six abandonments.[16] To the

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[16] The similarity between the instant case and *UTU v. CSX* is vividly illustrated by the Third Circuit's comments concerning the parties' past practices and the furlough and reduction in force provisions in their collective bargaining agreements. With respect to the agreement provisions, the court noted:

> The reduction in force and furlough provisions in the agreements allowed the Railroad to unilaterally abolish job assignments after giving notice. They also addressed the rights that Union employees had when jobs were abolished—namely, the right to bid on other assignments and "bump" other employees on the basis of seniority and to receive certain benefits if fur-

same effect are *CSX Transp., Inc. v. United Transp. Union*, 879 F.2d 990 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 720 (1990) ("*CSXT v. UTU*") and *Chicago & Northwestern Transp. Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S.Ct. 493 (1988). *See also Atchison, Topeka & Santa Fe Ry. v. RLEA*. No. 87 C 9848 (N.D. Ill. October 26, 1988) (challenge to line sale held to be minor dispute in light of force reduction provisions and past practice of engaging in line sales and abandonments and concurrently abolishing jobs); *Accord Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 783 (1st Cir.) (in light of past practice, challenge to carrier's right to lease a line presents a minor dispute), *cert. denied*, 479 U.S. 848 (1986). Only the Eighth Circuit in *RLEA v. Chicago & Northwestern Transp. Co.*, 890 F.2d 1024 (1989), *petition for cert. filed* March 29, 1990, is to the contrary.[17] But this case is neither apposite nor persuasive for, as the dissent notes, the court there was presented with an inadequate record on the parties' labor agreements and their past practices in connection with various line dispositions. *See* 890 F.2d at 1027. By contrast, the records in the *UTU v. CSX*, *CSXT v. UTU*, and *Chicago & Northwestern* are more fully developed and

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loughed. The agreements do not limit the reduction in force and furlough provisions to situations that do not involve sales.

893 F.2d at 592. And with respect to the past pattern of acquiescence, the court noted:

> The Railroad has disposed of rail lines on numerous occasions, leading to the abolishment of many job assignments. Indeed, it has sold segments of the Western Maryland lines on three other occasions since 1983. While labor protective conditions were imposed in two of these earlier sales, no claims were then made by the Union that the Railroad was acting outside the scope of the existing agreement, even though Union employees were obviously affected by the sales.

Id.

[17] Worth noting, however, is that the Eighth Circuit held the union could not prevent the carrier's planned line sale. *See* 890 F.2d at 1026. In this respect, that decision is consistent with the result reached here.

confirm the essential similarity of those cases to the case at bar.

II. § *6 Notices*

In 1988 and 1989, prior to instituting this action, labor defendants filed RLA § 6 notices calling upon defendants to bargain with the unions concerning the addition of successor provisions to the parties' labor agreements.[18] Plaintiffs, in Court III, claim these notices trump the "minor" dispute analysis, create a major dispute and require maintenance of the status quo during bargaining. This claim is unconvincing; it runs counter to principle and precedent. On principle, acceptance of this claim would effectively eliminate the major-minor dispute dichotomy long used under the RLA. Substantial precedent recognizes that this would be an inappropriate result. Courts have consistently rejected claims similar to plaintiffs', finding instead that minor disputes are not transformed into major disputes by the filing of RLA § 6 notices. As the Second Circuit noted, when a dispute arising from a line sale is minor, "the service of Section 6 notices by the appellant unions would have no transforming or alchemizing effect upon that [minor dispute] situation." *CSXT v. UTU*, 879 F.2d at 1000. In the Third Circuit's word, "[t]he Union's § 6 notice does not serve to short-circuit the arbitration process Congress specifically designed to resolve minor disputes." *UTU v. CSX*, 893 F.2d at 594. *See also Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 863 F.2d 891, 900 ("a rule that allows a party to characterize all disputes as 'major' through a

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[18] RLA § 6, 45 U.S.C. § 156, establishes the procedure for commencing and engaging in bargaining over any "intended change in agreements affecting rates of pay, rules, or working conditions." It further provides that after notice of an intended change has been given, "rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . ." This provision is commonly referred to as the "status quo obligation."

unilateral actions such as serving § 6 notices on the other party is unwise and contrary to the two-track procedure of the RLA"); *see also Chicago & North Western Transp. Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988); *RLEA v. Boston & Maine Corp.*, 808 F.2d 150, 156 (1st Cir. 1986), *cert. denied*, 484 U.S. 830 (1987); *Rutland Ry. Corp. v. Brotherhood of Locomotive Eng'rs*, 307 F.2d 21, 34-36 (2d Cir.), *cert. denied*, 372 U.S. 954 (1963); *Hilbert v. Pennsylvania R.R. Co.*, 290 F.2d 881, 885 (7th Cir.), *cert. denied*, 368 U.S. 900 (1961). In short, the labor plaintiffs' § 6 notices do not trump the major-minor analysis; they do not convert this minor dispute into a major one. The notices are effective only as to an "intended change in agreements." [19] If, as the Court has concluded here, the controversy is arguably covered by the existing agreements, then the dispute is "minor," from which it follows that the Court has no subject matter jurisdiction over the dispute, and the parties are relegated to their RLA arbitration remedy.

Even so, the labor plaintiffs claim that the service of their § 6 notices subjects defendants to the RLA's status quo obligation. Settled authority scuttle this claim, too. *Conrail v. RLEA*, 109 S. Ct. 2477, 2481 n.5 (1989) establishes that a carrier is under no obligation to maintain the status quo in a minor dispute. In such disputes, a carrier may continue to act on its interpretation of the labor agreement pending a resolution by an adjustment board under the RLA. *Conrail*, 109 S. Ct. at 2484; *see also UTU v. CSX*, 893 F.2d at 594 ("Because a minor dispute is involved, § 6's bargaining and status quo requirements are inapplicable and the arguments made by the Union on the nature of these requirements are not

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[19] Thus, the defendant railroads may well have an obligation to bargain with the unions as to the inclusion of such provisions in future agreements. *Cf. Pittsburg & Lake Erie R.R. v. RLEA*, 109 S.Ct. 2584, 2593-97 (1989) ("*P&LE v. RLEA*"). That issue is not presented here.

pertinent"); *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1520 (D.C. Cir. 1989) (trial court "had no jurisdiction to issue a status quo injunction" in minor dispute); *Chicago & North Western Transp. Co. v. RLEA*, 855 F.2d at 1287-88 (same); *Burlington Northern R.R. v. UTU*, 862 F.2d 1266, 1277 (7th Cir. 1988) (in minor dispute, carrier may "continue to apply its interpretation of the agreement" and "implement its view of the issue"); *International Ass'n of Machinists and Aerospace Workers, Dist. Lodge No. 19 v. Soo Line R.R. Co.*, 850 F.2d 368, 376 (8th Cir.) (*en banc*), *cert. denied*, 109 S. Ct. 1118 (1989); *Division No. 1, Bhd. of Locomotive Eng'rs v. Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988); *UTU v. Penn Central Transp. Co.*, 505 F.2d 542, 545 (3d Cir. 1974) (*per curiam*).

Next, labor plaintiffs argue that even if their § 6 notices did not create a status quo obligation, the various line transactions in issue resulted or will result in loss of jobs by employees thereby causing a "change in agreements affecting rates of pay, rules or working conditions" under RLA § 6. This, plaintiffs claim, would then give rise to a duty on the part of defendants to give the unions notice of the changes and then to maintain the status quo while bargaining over the changes. Again, established authority contradicts this claim. *Pittsburg* [*sic*] *& Lake Erie R.R. v. RLEA* ("*P&LE v. RLEA*"), 109 S. Ct. 2584 (1989) makes clear that a carrier intending to dispose of all its assets incurs no § 6 duty to give notice and bargain over its decision. *Id.* at 2592-93. In that case, the Supreme Court rejected the union's claim that "loss of jobs by possibly two-thirds of the employees" would trigger the carrier's RLA § 6 notice and status quo obligations. *Id.* at 2595.[20] That the transaction in *P&LE v.*

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[20] The Supreme Court in *P&LE v. RLEA* also held that a carrier disposing of its railroad operating assets pursuant to 49 U.S.C. § 10901 was required to engage in "effects bargaining" in

RLEA was a sale of all the carrier's assets is not a significant distinction from the instant case, which involves dispositions of only portions of a carrier's assets. No reason in principle and nothing in the *P&LE* decision requires that partial asset dispositions be treated differently from complete asset sales for purposes of the RLA § 6 notice and status quo obligations. Thus, *P&LE v. RLEA* teaches that job losses, if any, resulting from the transactions here in issue do not trigger defendant's RLA § 6 notice and status quo obligations.

In sum, this Court's minor dispute holding and its conclusion that defendants have no RLA status quo obligation dispose of the Amended Complaint and plaintiff's request for injunctive relief. It is, therefore, unnecessary to reach the merits of labor plaintiffs' other RLA claims [21] or defendants' statute of limitations and waiver defenses.[22] But still remaining for consideration is de-

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response to union § 6 notices. Significantly, the Court also held that in the absence of existing agreement provisions prohibiting or otherwise limiting the railroad's line disposition, the carrier was under no status quo obligation. *See also RLEA v. Chicago & Northwestern Transp. Co.*, 890 F.2d 1024 (8th Cir. 1989). *P&LE* is no authority for requiring even "effects bargaining" in the majority of the transactions encompassed in plaintiffs' Count III. Virtually all of the transactions have been carried out under 49 U.S.C. § 11343 rather than 49 U.S.C. § 10901. In transactions carried out under § 11343, the ICC imposes its statutorily mandated employee protective conditions, which provide an exclusive mechanism for negotiations concerning the implementation and effects of transactions. In these instances, the RLA major dispute bargaining requirements do not apply. Even in the few transactions where defendants may have an "effects bargaining" obligation, that obligation does not subject the transactions to the status quo obligation. *See P&LE v. RLEA*, 109 S. Ct. at 2597.

[21] In Count II of the Amended Complaint, labor plaintiffs contended that defendants violated their RLA obligations under §§ 2 Third and Ninth when they consummated the lease and trackage rights transactions.

[22] Defendants contended that plaintiffs' claims are governed and barred by the six month statute of limitations contained in § 10(b)

fendants' claim for injunctive relief against threatened self-help by the labor plaintiffs. Also remaining for consideration, as an alternative basis for summary judgment as to certain of the transactions in issue, is defendants' contention that the ICC has excluive jurisdiction over those transactions.

III. *ICC Exclusive Jurisdiction*

Many of the line transactions in issue were authorized by the ICC pursuant to 49 U.S.C. § 11343.[23] Specifically, these transactions include (i) all the TSL leases, except those allowed under 49 U.S.C. § 10901, (ii) the CW lease and (iii) the VIP trackage rights transaction. In each of the transactions authorized under § 11343, the ICC has imposed its standard employee protection conditions. Pursuant to these conditions, the defendant carriers have given notice to their employees and, when required by the conditions, the defendant carriers have

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of the National Labor Relations Act, 29 U.S.C. § 160(b). *See Triplett v. Brotherhood of Railway, Airline & S.S. Clerks*, 801 F.2d 700, 702 (4th Cir. 1986) (§ 10(b) limitations period applied to unfair representation claims under the RLA). Defendants also contended that certain of labor plaintiffs, specifically the BLE and the UTU, have waived any claims they may have had regarding the VIP trackage rights transaction.

[23] This provision states, in pertinent part:

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

* * * *

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

* * * *

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

negotiated implementing agreements with the pertinent unions. Under these circumstances, defendants contend, the RLA is displaced and exclusive jurisdiction over these transactions and their effects on employees is vested in the ICC. This contention is valid.

In the case of § 11343 authorized transactions,[24] Congress has provided, in 49 U.S.C. § 11347, an exclusive mechanism designed to govern the rights affected employees [*sic*]. This mechanism permits the parties to negotiate a fair arrangement for employees affected by covered transactions, but requires carriers implementing those transactions "to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this Section before February 5, 1976 and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." Routinely, and in the transactions at bar, the ICC has imposed so-called *Mendocino Coast* coast conditions[25] which have been held to satisfy § 11347 requirement for protective conditions. This mechanism governs exclusively the rights of employees in the covered transactions; it displaces RLA-based rights in this context.

Settled authority confirms this result. The Eighth Circuit so ruled in *Brotherhood of Locomotive Eng'rs v. Chicago & North Western Ry. Co.*, 314 F.2d 424, *cert. denied*, 375 U.S. 819 (1963). In reaching its conclusion, that court recognized that application of the RLA and its purposely drawn out procedures would allow unions effectively to block approved transactions.[26] In this context, as

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[24] The ICC's exercise of its § 11343 power may be in the form of a decision approving a transaction or a decision allowing a transaction to proceed pursuant to 49 U.S.C. § 10505 under an exemption from the provision's prior approval requirement.

[25] *See supra* n. 7 and accompanying text.

[26] The RLA major dispute procedures are "purposely long and drawn out," *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 246 (1966), and exhaustion of them

the Eighth Circuit recognized, invocation of the RLA "would threaten to prevent many consolidations" in direct contravention of congressional intent. 314 F.2d at 430-31. Other courts have consistently followed the Eighth Circuit's reasoning and result. *See, e.g., Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 800-01 (1st Cir.) (ICC authorization of transactions under § 10505 precludes RLA remedies that would circumvent protective conditions), *cert. denied*, 479 U.S. 829 (1986); *Burlington Northern, Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (*per curiam*) (employee protective agreement adopted by ICC as condition on its approval of merger was "not inconsistent with any provision of the [RLA], and if it were, its provisions would be controlling"), *cert. denied*, 421 U.S. 975 (1975); *Nemitz v. Norfolk & Western Ry. Co.*, 436 F.2d 841, 844-46 (6th Cir.) (where ICC adopts the terms of an employee protective agreement as conditions on its approval of a consolidation, the parties' rights under the protective conditions flow from the ICC's order, not from the original agreement, and the parties may not invoke RLA remedies for the purpose of determining their rights, which arise under the ICA), *aff'd on other grounds*, 404 U.S. 37 (1971). *See Brotherhood of Locomotive Eng'rs v. ICC*, 808 F.2d 1570, 1578-79 and n.75 (D.C. Cir. 1987) (arbitrator acting under ICC-imposed protective conditions is empowered to decide which labor agreements will apply to employees being transferred from one railroad to another). *See also UTU v. Norfolk & Western Ry. Co.*, 332 F. Supp. 1170, 1174-75 (N.D.

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is "an almost interminable process," *Detroit & Toledo Shore Line R.R. Co. v. UTU*, 396 U.S. 142, 155 (1969). In the end, if the paries cannot agree on terms "no authority is empowered to decide the dispute," *Elgin, Joilet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 725 (1945), and the parties are free to resort to self-help. *Id.* at 724.

Ohio 1971) (arbitration requirement of ICC-approved job protection agreement supplants RLA remedies).[27]

The ICC has also held that its § 11347 protective conditions, not the RLA, control the rights of affected employees in § 11343 transactions. *See Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967); *Denver & Rio Grande Western R.R.—Trackage Rights—Mo. Pac. R.R.*, Finance Docket No. 30,000 (served October 25, 1983), *appeal dismissed sub nom. I.C.C. v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987); *Maine Central R.R., et al.—Exemption*, Finance Docket No. 30532 (Served September 13, 1985), *aff'd mem. sub nom. RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987).

Brotherhood of Ry. Carmen v. I.C.C. ("Carmen"), 880 F.2d 562 (D.C. Cir. 1989), *cert. granted sub nom. Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 110 S.Ct. 1522 (1990) does not contradict this line of authority. At issue there were two ICC decisions reviewing arbitrator awards made under protective conditions imposed in two ICC-approved railroad consolidations. In both cases, the ICC had ruled (i) that the consolidations were subject to 49 U.S.C. § 11341(a) as well as to § 11347 (ii) that arbitrators could override labor agreements as necessary in connection with the conditions and (iii) that the statutory protective conditions prevail over inconsistent RLA-based claims, including claims based on

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[27] Courts have reached the same result in cases arising in the airline industry, which is also generally subject to the RLA. *See, e.g., Int'l Ass'n of Machinists and Aerospace Workers v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *Int'l Ass'n of Machinists and Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *American Airlines, Inc. v. CAB*, 445 F.2d 891, 896-97 (2d Cir.) (Friendly, J.), *cert. denied*, 404 U.S. 1015 (1972); *Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.) ("[a] private [labor] contract must yield to the paramount power of the [CAB] to perform its duties under the statute creating it to approve mergers . . . ."), *cert. denied*, 346 U.S. 826 (1953).

labor agreements. The D.C. Circuit held the § 11341(a) "does not grant the ICC its claimed power to override provisions" of a labor agreement. 880 F.2d at 574. It reversed on this point, but specifically declined to address the ICC's conclusion that by virtue of § 11347, the arbitration procedure contained in the protective conditions displaces the RLA. 880 F.2d at 573. Thus, *Carmen*, is distinguishable from the settled line of authority cited above. The principal focus of *Carmen* is the ICC's § 11[1]34(a) authority to modify or override labor agreements. Section 1134[1](a) [*sic*] is not central here. In the transactions at bar, the ICC has imposed employee protective conditions pursuant to § 11347, which is made applicable in exemption cases, like those at bar, by 49 U.S.C. § 10505(g)(2). *Carmen* did not reach the § 11347 issue.

In summary, certain of the challenged transactions have proceeded by virtue of the ICC's § 11343 authority, with the result that in these instances, the ICC has imposed § 11347 employee protective conditions. These transactions are immune from labor plaintiff's RLA claims. The ICC has exclusive jurisdiction over these transactions.[28]

IV. *Injunctive Relief for Defendant Railroads*

In their counterclaim, the railroad defendants seek an order enjoining the labor plaintiffs from striking or engaging in any self help in an effort to block the challenged line transactions. Such relief, they claim, is appropriate given the Court's finding that the Amended Complaint presents a minor dispute. It is true that strikes over

[28] As noted, the Court's principal holding is that the Amended Complaint presents a minor dispute over which the Court has no subject matter jurisdiction. That ruling is fully dispositive. Anticipating that the matter may be appealed, the Court chose to reach and decide the ICC exclusive jurisdiction issue as an alternative dispositive ground for dismissal as to certain of the challenged transactions.

minor disputes are prohibited and may be enjoined consistent with the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, which generally prohibits federal injunctive relief in labor disputes. *See Burlington Northern R.R. Co. v. BMWE*, 481 U.S. 429, 445 (1987) (because it is necessary to "accommodate the competing demands of the RLA and the Norris-La Guardia Act," injunctive relief is appropriate to ensure "compliance with the various mandates of the [RLA]."); *Brotherhood of Redwood Trainmen v. Chicago River & Indiana R.R. Co.*, 373 U.S. 33, 41-2 (1963) [*sic*]; *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 353 U.S. 30, 42 (1957) [*sic*]. And courts have issued strike injunctions in aid of minor dispute rulings. *See UTU v. CSX*, 893 F.2d at 595; *CSXT v. UTU*, 879 F.2d at 1004; *Chicago & North Western Transp. Co. v. RLEA*, 855 F.2d at 1288. In this instance, however, the Court concluded that injunctive relief was unnecessary in the face of labor plaintiffs' assurances that no self-help would be undertaken.[29] This result is in ac-

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[29] The absence of a strike threat was made clear by the declarations filed in this matter by Richard L. Kilroy, President of the TCU, and Fred A. Hardin, President of the UTU. In this regard, Mr. Kilroy stated:

> Declarant is well aware that this Court has ruled that the dispute over whether the NS rail system may sell or otherwise transfer rail lines during bargaining is a "minor" dispute subject to arbitration, and until that ruling is overturned on appeal or vacated by this Court on reconsideration, or until this Organization is no longer restrained by the bargaining and status quo obligations of the Railway Labor Act (under Sections 2 First, 5 First and 6 of that Act) from engaging in self-help over the line sale problem, including over the impact of the Wheeling transaction on TCU members, declarant will not authorize any strike or other job action to the [*sic*] taken by TCU against the NS system over the Wheeling transaction or over any other NS line sale.

When the labor plaintiffs later changed their minds and resolved to employ self-help in this matter, they promptly advised the Court, which then, at the request of NW, issued specific injunctive relief in the context of a related case. *See supra* note 4.

cord with the Supreme Court's instruction that the "judiciary should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right." *Burlington Northern R.R.*, 481 U.S. at 446, *quoting International Ass'n of Machinists v. Street*, 367 U.S. 740, 773 (1961).

Appropriate Orders dated February 16, 1990 and May 15, 1990 have issued.

The Clerk is directed to issue copies of this Memorandum Opinion to all counsel of record.

/s/ T. S. Ellis
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia

June 13, 1990

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 89-1157-A

RAILWAY EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Defendants.

JUDGMENT

[Filed Jul. 3, 1990]

This action came before the Court for decision on motions for summary disposition and the issues having been heard and determined in the orders of the Court dated February 16, 1990, and May 15, 1990, and the Court having entered a Memorandum Opinion dated June 13, 1990, setting forth the reasons for its orders,

IT IS ORDERED AND ADJUDGED, that plaintiffs' complaint shall be, and hereby is, dismissed for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), Fed. R. Civ. P. The declaratory relief sought in defendants' counterclaim shall be, and hereby is, denied on the ground that such relief is encompassed in the dismissal of plaintiffs' complaint. The injunctive relief sought in defendants' counterclaim shall be, and hereby is, denied, on the ground that at the time the matter was heard, a strike was not imminent. All other requests for relief have been denied.

DORIS R. CASEY,
Clerk

/s/ JOHANNA SOLOMON
(By) Deputy Clerk

Date: July 3, 1990

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed: May 18, 1990

No. 90-2677

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiff-Appellant,

versus

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Defendant-Appellee.

ORDER

This day came the attorneys for the plaintiffs and defendants on the motion for an injunction pending appeal taken by the plaintiffs from two orders of the district court entered in this case February 16, 1990 and May 15, 1990. The February 16th order dismissed the complaint for want of jurisdiction, and the May 15th order declined to grant temporary injunctive relief on specific request. I am tentatively of opinion that, since the complaint asked for injunctive relief and the later denial of injunctive relief was on the denial of a motion therefor, that both of these orders are appealable under 28 USC § 1292(a)(1). See *George P. Converse & Co., Inc. v. Polaroid Corporation*, 242 F.2d 116, 119 (1st Cir. 1957).

The plaintiffs take the position that the order of May 15th should be vacated and the case remanded because of a failure to comply with the provisions of FRCP 52 that it state the facts on which it was based. The facts, how-

ever, have been stated at the hearings, so I am of opinion that such a motion should be denied.

The dispute, which is now on appeal, is an outgrowth of the sale or lease by Norfolk Southern Railway of 565 miles of its lines to a newly formed railroad (not previously in the railroad business) called Wheeling and Lake Erie Railway Company. That sale and lease was accomplished under existing statutes and regulations of the Interstate Commerce Commission, from which appeal has not been taken, and so in this case must be considered regular in all respects. The sale was final on May 17, 1990.

As a result of the sale, some 450 jobs on Norfolk Southern were abolished. Somewhat less than half of the employees holding these jobs have been re-employed by Wheeling, and the vast majority of the balance of the 450 employees initially affected have bumping rights under the collective bargaining agreements in effect. At least 50 employees, according to plaintiffs, however, have no bumping rights and are simply without work. Plaintiffs' statement is unrefuted at this time.

The plaintiffs, representing all of the unions involved, sought to enjoin the sale or lease of the railway properties involved until a dispute over the treatment of such employees could be settled by the unions and Norfolk Southern. When the unions heard of the transfer to Wheeling, they made demands under 45 USC § 156 for a change in the terms of the collective bargaining agreements to take into account the treatment of employees as a result of such transfers, and the parties have negotiated since with respect to those demands. The engineers' union, indeed, has settled with Norfolk Southern.

In the meantime, Norfolk Southern has treated the employees whose jobs were abolished by the transfer in accordance with the contractual provisions for abolition of jobs by reason of other, or for any, cause. The railroad

says that it has handled such occurrences in the past in the same way.

If the dispute between the unions and Norfolk Southern is over a change in the contractual terms, it is a major dispute under the Railway Labor Act, and if over the interpretation of an existing agreement, it is a minor dispute. If the dispute, which admittedly exists, is minor rather than major, the parties are bound to arbitrate the same under the Railway Labor Act.

After hearings, the district court decided that the dispute was, in fact, minor, and on this basis dismissed the complaint for want of jurisdiction.

While the discussion of the issues involved in this case may range far and wide, an essential issue to be decided in this narrow appeal is whether the dispute which exists is major or minor. I cannot see from the papers presented to me that the action taken by Norfolk Southern was not arguably justified by the terms of the collective bargaining agreements. That finding is largely factual and even if Rule 52 does not apply in this proceeding, I am lothe, at this stage, to find the finding of the district court to be probably in error. If the finding of the district court that this is, in fact, a minor dispute, is correct, it follows that the district court had no authority to act to enjoin the sale.

I am aware that if this is a major dispute, the unions may be entitled to an injunction to preserve the status quo. And, although the property involved has been transferred, the unions now ask for equivalent relief by requiring Norfolk Southern to continue all of the employees involved on the payroll during the pendency of this appeal.

In considering whether to grant an injunction pending appeal, I take into account the probability of success of the appellant, the relative harm to the parties by the issuance or refusal of an injunction, and the public interest.

The public interest is, of course, served by compliance with the federal statutes involved, both the Railway Labor Act and the Interstate Commerce Act. The transfer of assets has been accomplished under the provisions of the Interstate Commerce Act, and no appeal from that decision has been taken. Neither has the Interstate Commerce Commission provided for labor security, as it might have done. I can see no obvious violation of any public policy by any of the parties in this case, and, therefore, I think that the public interest only requires a dispassionate decision on the merits of the case.

I think the plaintiffs in the case have, at best, no better than an even chance of prevailing on appeal. While the parties acknowledge there is a split of authority between the circuits on the question of whether or not such disputes are properly considered major or minor, I find no apparent error in the opinion of the district court stating that the position of Norfolk Southern was arguably justified.

The harm to Norfolk Southern, of course, by an injunction pending appeal would not be great, but other things must be considered. First, an appeal could have been taken several months ago and an injunction thereon would not have been asked to have effect on a transfer already accomplished. Along the same line, technically speaking, a transfer of property, the sale of which is sought to be enjoined, is usually considered to moot the request for an injunction. So while there will admittedly be hardship on the part of some of the employees, much of that is of their own making and the chance of success in this whole case, which cannot be considered great, leads me to believe that there is no great difference in harm which would justify the imposition of injunctive relief, the request for which may have come too late.

Principally because, however, of the 50 or more railway employees whose livelihood apparently is more directly affected by this transfer, I am going to expedite this

appeal, to be heard at the first convenient term of court. The clerk will arrange an appropriate briefing schedule.

It is accordingly ADJUDGED and ORDERED as follows:

I.

The motion of the plaintiffs for an injunction pending appeal shall be, and the same hereby is, denied.

II.

This appeal is expedited, to be heard at the first convenient term of court.

Both of the attorneys objected to every adverse holding in this order for every reason which would be supported by the record.

Entered this 18th day of May, 1990.

H. E. WIDENER, JR.
U.S. Circuit Judge

APPENDIX H

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 3

45 U.S.C. § 153

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as

have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such

vacancy occurs, the Mediation Board shall thereupon directly make the appontment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary

traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the

foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, in failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party

to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as

other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in the United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the di-

vision or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several division or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such

rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Therefore each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional

boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph *(l)* hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by

the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon which such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishing of the special board, shall consitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the

dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

D. Section 5 First

45 U.S.C. § 155 First

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

E. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier

until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

F. Section 10

45 U.S.C. § 160

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however*, that no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

APPENDIX I

Railway Labor Executives' Association
Member Organizations

*American Railway & Airway Supervisors Association (Division of TCU);

*American Train Dispatchers Association;

*Brotherhood of Locomotive Engineers;

*Brotherhood of Maintenance of Way Employes;

*Brotherhood of Railroad Signalmen;

*Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

*International Association of Machinists and Aerospace Workers;

*International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

*International Brotherhood of Electrical Workers;

*International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Seafarers International Union of North America;

*Sheet Metal Workers' International Association;

Transport Workers Union of America; and

*Transportation•Communications International Union (TCU)

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* Those RLEA member organizations which represent employees on respondents Norfolk Southern Corporation, *et al.*, and are individual petitioners herein are designated by asterisks.